

1996

## Strict Scrutiny Across the Board: The Effect of *Adarand Constructors, Inc. v. Peña* on Race-Based Affirmative Action Programs

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### Recommended Citation

Mary J. Reyburn, *Strict Scrutiny Across the Board: The Effect of Adarand Constructors, Inc. v. Peña on Race-Based Affirmative Action Programs*, 45 Cath. U. L. Rev. 1405 (1996).

Available at: <https://scholarship.law.edu/lawreview/vol45/iss4/10>

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STRICT SCRUTINY ACROSS THE BOARD:  
THE EFFECT OF *ADARAND*  
*CONSTRUCTORS, INC. v. PENA*  
ON RACE-BASED  
AFFIRMATIVE ACTION PROGRAMS

The Equal Protection Clause of the Fourteenth Amendment<sup>1</sup> ensures individuals equality under the law.<sup>2</sup> Nowhere is this more true than in the

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1. U.S. CONST. amend. XIV, § 1. The Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.* Section Five of the Fourteenth Amendment gives Congress the “power to enforce, by appropriate legislation, the provisions of this article.” *Id.*

The Court also recognizes a corresponding equal protection guarantee, applying to the actions of Congress, incorporated in the Due Process Clause of the Fifth Amendment. *See generally* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977) (examining the Court's treatment of Fifth Amendment equal protection claims). *See also infra* notes 65-85 and accompanying text (discussing the progression of Supreme Court decisions culminating in the recognition of the Fifth Amendment's equal protection component).

2. U.S. CONST. amend. XIV, § 1. The importance of equality has been espoused since the birth of our nation: “We hold these Truths to be self-evident, that all Men are created equal . . .” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). While the notion of equality was a distinctive feature of the early American spirit, it remained unsecured for American citizens until the inclusion of the Equal Protection Clause in the Fourteenth Amendment. WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, 107-08 (1898).

By the Fourteenth Amendment, the principle of equality before the law, a principle so vital and fundamental in American institutions, ceased to be a mere theory or sentiment, or an implied condition, and became incorporated into the organic law as the fundamental right of every individual . . . . The provision, if properly construed, assures to every person within the jurisdiction of any State, whether he be rich or poor, humble or haughty, citizen or alien, the protection of equal laws, applicable to all alike and impartially administered without favor or discrimination.

*Id.* at 110; *see also* GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY 178 (1995) (noting that the Equal Protection Clause made explicit in the Constitution the American principle of equality dating back to the Magna Carta and proclaimed in the Declaration of Independence).

Indeed, those supporting the ratification of the Fourteenth Amendment advocated the need to make all citizens equal in the eyes of the law. *See* CHESTER J. ANTIEAU, THE

realm of racial discrimination.<sup>3</sup> Ratified after the Civil War as one of the Civil War Amendments,<sup>4</sup> the Fourteenth Amendment represented the

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ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT 14-17 (1981) (quoting the statements of various politicians debating the ratification of the Fourteenth Amendment). For example, Senator John Sherman of Ohio asserted that all people "should stand equal before the law." *Id.* at 16. Similarly, Senator Lyman Trumbull argued that the amendment "would put in the fundamental law the declaration that all the citizens were entitled to equal rights in this Republic . . ." *Id.* at 15. For an extensive discussion of the legislative history of the Fourteenth Amendment, see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

In recent years, the Equal Protection Clause has been increasingly targeted as the most important guarantee of an individual's right to equality under the law. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.1 (5th ed. 1995); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291-92 (1978) (opinion of Powell, J.) (noting that following the substantive due process era, the Equal Protection Clause attained newfound vitality as a protection against discrimination). In fact, shortly after its adoption, one author predicted that the equal protection guarantee would "probably be found in the future to be the most important and far-reaching of the provisions of . . . [the Fourteenth] amendment." GUTHRIE, *supra*, at 108.

3. See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (stating that, "the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States"). Indeed, the desire to secure the rights of the newly emancipated slaves and prevent further discrimination against all blacks prompted the adoption of the Fourteenth Amendment. *E.g.*, ANASTAPLO, *supra* note 2, at 178; GERALD GUNTHER, *CONSTITUTIONAL LAW* 399 (12th ed. 1991); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 120 (1994); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1475 (1995); Samuel L. Starks, *Understanding Government Affirmative Action and Metro Broadcasting, Inc. v. FCC*, 41 DUKE L.J. 933, 942 (1992); see also *Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (positing that the Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons").

Despite this central purpose, the Framers of the Equal Protection Clause utilized broad terminology, intimating the Clause's applicability to all types of discriminatory legislation. See *Bakke*, 438 U.S. at 293 (opinion of Powell, J.) (stating that although the Framers intended to bridge the gap between the white majority and the black minority, "the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude."); see also *infra* notes 97-98 and accompanying text (discussing Justice Powell's opinion in *Bakke*). Based on political commentary proffered throughout the adoption of the Fourteenth Amendment, there appeared to be a general understanding that the Clause would protect whites and blacks. ANTIEAU, *supra* note 2, at 24-25. But see Spann, *supra*, at 1475 (stating that the drafters intended to punish the southern whites, not protect them).

4. Prior to the Civil War, there were no constitutional protections against the government's ability to limit an individual's rights solely because of race. GUTHRIE, *supra* note 2, at 107-08. Rather, slavery existed as a constitutionally permissible institution. See generally ROBERT B. SHAW, *A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES* (1991) (discussing in detail the origins and existence of slavery in the United States). In fact, South Carolina delegate Pierce Butler drafted a fugitive slave provision that was later incorporated into the Constitution in 1787:

nation's first significant step toward racial equality.<sup>5</sup> Since then, Congress has utilized its authority sporadically to enact legislation aimed at com-

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No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

*Id.* at 234. Because this provision proved insufficient, Congress passed the Fugitive Slave Act of 1793 and later, the Fugitive Slave Law of 1850. *Id.* at 235-39. The Supreme Court upheld the legislation granting slave-owners the right to recapture slaves. *See Prigg v. Pennsylvania*, 41 U.S. (16 Peters) 539, 625-26 (1842) (invalidating a state law that held slave catchers liable for kidnapping, as contrary to the Constitution). Tension mounted, however, between the North and South in part because the northern states passed personal liberty laws preventing the return of fugitive slaves, and granted fugitive slaves rights not recognized under federal law. *See SHAW, supra*, at 244 (discussing an 1840 New York law that gave fugitive slaves the right to trial by jury). Slavery legally ended during the Civil War upon President Abraham Lincoln's issuance of the Emancipation Proclamation. PERRY, *supra* note 3, at 117.

Shortly after the Civil War, Congress ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, commonly referred to as the Civil War Amendments. ANASTAPLO, *supra* note 2, at 168-70.

The Thirteenth Amendment prohibits slavery in the United States. U.S. CONST. amend. XIII, § 1. It states, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.* This amendment applies even where no state action occurs. NOWAK & ROTUNDA, *supra* note 2, § 14.7, at 642.

Section One of the Fourteenth Amendment grants certain individual rights that must be upheld by the states. *See supra* note 1 (providing the text of this section). Section One of the Fourteenth Amendment contains a due process guarantee like that of the Fifth Amendment, as well as the express guarantee of equal protection of the laws. U.S. CONST. amend. XIV, § 1. Section Two mandates that states count all people as whole for purposes of representation in Congress, displacing the constitutional provision that treated slaves as three-fifths of a whole. U.S. CONST. amend. XIV, § 2. It also reduces a state's representation in Congress if that state denies any male citizen the right to vote. *Id.*

The Fifteenth Amendment expressly precludes the use of race as a basis for denying a citizen's right to vote. U.S. CONST. amend. XV, § 1. It states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* These amendments, as a whole, represent the congressional desire to ensure liberty for the freed slaves following the Civil War. *E.g.*, ANASTAPLO, *supra* note 2, at 169-70; NOWAK & ROTUNDA, *supra* note 2, § 14.7, at 643; Seth Hilton, Comment, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?*, 28 U.C. DAVIS L. REV. 445, 450 (1995).

5. *See, e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872) (asserting that the purpose of the Fourteenth Amendment was to protect the "newly-made freeman" from the domination and oppression of the majority class); NOWAK & ROTUNDA, *supra* note 2, § 14.7, at 643 (explaining the desire shared by a large portion of the population, especially in the North, to safeguard the freedom and social equality of the freed slaves).

Despite this primary purpose, the Equal Protection Clause protects all people, regardless of race, assuring all citizens equal treatment under the law. *See supra* notes 2-3 and accompanying text. Unfortunately, the promise of equality has gone largely unfulfilled. Gerald S. Janoff, Comment, *Adarand Constructors, Inc. v. Peña: The Supreme Court to Decide the Fate of Affirmative Action*, 69 TULANE L. REV. 997, 997 (1995).

batting race discrimination.<sup>6</sup> The quest for equality continues today, evi-

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Following the Civil War, the South continued to subordinate the freed slaves through the Black Codes. PERRY, *supra* note 3, at 117. These laws limited the rights of the former slaves, such as the freedom to purchase land. See *Slaughter-House Cases*, 83 U.S. at 70 (describing the Black Codes). Congress passed the Civil Rights Act of 1866 to invalidate the Black Codes; shortly thereafter, Congress proposed the Fourteenth Amendment. PERRY, *supra* note 3, at 118. The Fourteenth Amendment, in large part, constitutionalizes the Civil Rights Act of 1866. *Id.*; ANTIEAU, *supra* note 2, at 2. Thus, the Fourteenth Amendment finally made explicit the country's commitment to equality. GUTHRIE, *supra* note 2, at 110.

The monumental task of achieving the goal of equality was hindered, in large part, by the decisions of the Supreme Court following the Civil War. See, e.g., Mary C. Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 908 (1992) (noting that several of the post-Civil War decisions prevented the progress of racial equality); Will Maslow & Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 370-73 (1953) (discussing several Court decisions that limited the scope of the Civil War Amendments and Congress's enforcement legislation). For example, the Court found that under the Civil Rights Act of 1870, Congress did not have the power to impose criminal punishments for wrongdoings at elections. *James v. Bowman*, 190 U.S. 127, 142 (1903). In another case, the Court invalidated the first two sections of the Civil Rights Act of 1875 because they applied to private action and thus were not authorized by the Thirteenth or the Fourteenth Amendments. *Civil Rights Cases*, 109 U.S. 3, 25-26 (1883).

6. Even before the enactment of the Fourteenth Amendment, Congress attempted to curtail race discrimination through the Civil Rights Act of 1866. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). See *supra* note 5 (briefly discussing this Act). The Act provided:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

*Id.* ch. 31, § 1. Because Congress doubted its authority to create the Act and feared the Act's subsequent repeal, Congress incorporated the fundamental principles of the Act into the Fourteenth Amendment. E.g., ANTIEAU, *supra* note 2, at 2; Maslow & Robison, *supra* note 5, at 368. Section Five of the Amendment gave Congress the explicit "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

Soon after the States ratified the Fourteenth Amendment, Congress, now confident in its power to do so, enacted additional laws aimed at protecting civil rights. See, e.g., Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875) (prohibiting discrimination in public places including inns, theaters, and public conveyances); Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871) (imposing civil penalties on anyone depriving another of his civil rights); Civil Rights Act of 1870, ch. 114, 16 Stat. 140 (1870) (enforcing the right of all citizens to vote, as well as imposing criminal penalties for fraud and other malfeasances in federal elections).

denced by large disparities among races in education,<sup>7</sup> employment status,<sup>8</sup> and income,<sup>9</sup> as well as the government's continuing effort to im-

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Unfortunately, several Supreme Court decisions limited the effect of these statutes. See *supra* note 5 (discussing a number of these decisions).

Congress spent the next several decades attempting to override state statutes aimed at subjugating blacks in various areas, such as voting. See Maslow & Robison, *supra* note 5, at 373-80 (discussing in detail the schemes used by states to inhibit blacks' right to vote). Indeed, the "separate but equal doctrine" allowed states to enforce separation of the races in education, transportation, recreation, and public accommodations. *Id.* at 386-89 (examining segregation and the Supreme Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

Following the Civil Rights Movement of the 1950s, Congress passed the Civil Rights Act of 1964, codifying the country's renewed commitment to racial equality after nearly fifty years of segregation. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 (1994), 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1994)) (broadly prohibiting racial discrimination in public places).

Title VII of this Act banned employment discrimination based on race, color, religion, sex or national origin, and created the Equal Opportunity Employment Commission (EEOC). 42 U.S.C. § 2000e-4 (1994). In 1972, the powers of the EEOC were expanded by an amendment to Title VII that enabled the Commission to sue employers acting in a discriminatory manner. Equal Opportunity Employment Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e-5(c)-2000e-17 (1994)). It also brought actions by state and local governments, as well as federal administrative agencies, under the breadth of the statute. Janoff, *supra* note 5, at 1008. See Michael K. Braswell et al., *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 368-72 (1993) (describing the history of federal affirmative action policies relating to employment); Daron S. Fitch, Note, *The Aftermath of Croson: A Blueprint for a Constitutionally Permissible Minority Set-Aside Program*, 53 OHIO ST. L.J. 555, 558 (1992) (discussing the ability of government agencies to utilize affirmative action policies under the Title VII amendments).

7. For example, in 1994, 22.9% of whites completed four or more years of college, compared to only 12.9% of blacks and 9.1% of Hispanics. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995 157 (115th ed. 1995) [hereinafter CENSUS]. In that same year, 82% of whites completed at least four years of high school, compared to 72.9% of blacks, and 53.3% of Hispanics. *Id.* See also Starks, *supra* note 3, at 934 nn.5-8 (providing further statistical evidence of the inequality between blacks and whites).

8. In 1994, 3.3% of all lawyers were black, and 3.1% of lawyers were Hispanic; 3.7% of engineers were black, while 3.3% of engineers were Hispanic; 24% of all social workers were black, while 7% were Hispanic; 29.3% of all nursing aides, orderlies, and attendants were black, and 8.9% were Hispanic; 4.2% of physicians were black, and 5.2% of physicians were Hispanic; 17.9% of cooks were black, while 16.8% were Hispanic. CENSUS, *supra* note 7, at 411-13.

In 1994, 5.8% of white high school graduates were unemployed, while 12.2% of black high school graduates, and 8.3% of Hispanic high school graduates were unemployed. *Id.* at 422. See also *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2135 n.3 (1995) (Ginsburg, J., dissenting) (discussing the persistent discrimination against black and Hispanic job applicants). In a 1990 study conducted by the Urban Institute, white job applicants received 52% more job offers than equally qualified Hispanics. Harry Cross et al., *Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers*, URB. INST. REP. 90-4 42 (1990), cited in *Adarand*, 115 S. Ct. at 2135 n.3 (Ginsburg, J., dissenting).

plement race-based affirmative action<sup>10</sup> programs.<sup>11</sup>

9. In 1993, whites had a median household income of \$32,960, while \$19,533 was the median for blacks, and \$22,886 was the median for Hispanics. CENSUS, *supra* note 7, at 469. For each dollar earned by a white male, white females earn 75 cents, black males earn 74 cents, black females earn 63 cents, Hispanic males earn 63 cents, and Hispanic females earn 56 cents. Patsy Bakunin, *Affirmative Action Still Necessary. Women and Minorities, Patsy Bakunin Says, Must Protect Meager Progress They've Made*, PHOENIX GAZETTE, Nov. 16, 1995, at B7.

10. "Affirmative action programs" are described as:

Employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; *i.e.* positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination; commonly based on population percentages of minority groups in a particular area. Factors considered are race, color, sex, creed and age.

BLACK'S LAW DICTIONARY 59 (6th ed. 1990) (citations omitted).

Affirmative action programs, generally, provide preferences in the distribution of social, economic, or public benefits to certain people because of their membership in a particular group. Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation Theory after Richmond v. J.A. Croson Co. and Metro Broadcasting, Inc. v. Federal Communications Commission*, 17 T. MARSHALL L. REV. 317, 320 (1992). The goal of these preferences is to redress past harm suffered by members of that particular group. *Id.* These programs also are labelled "benign" or "remedial" preferences. *Id.*; *see also* Braswell et al., *supra* note 6, at 366 (defining affirmative action).

The federal government's definition of affirmative action, as set forth by the Equal Opportunity Employment Commission, includes "actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." 29 C.F.R. § 1608.1(c) (1995); *see infra* notes 19-24 and accompanying text (discussing the origins of affirmative action programs).

Affirmative action programs may be utilized in a variety of areas, such as education, employment, housing, and voting. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1989) (construction contracts); *Johnson v. Transportation Agency*, 480 U.S. 616, 619 (1987) (employment promotions); *United Steelworkers of America v. Weber*, 443 U.S. 193, 197 (1979) (collective-bargaining); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-70 (1978) (opinion of Powell, J.) (graduate school admissions). In addition, Congress has enacted a variety of affirmative action programs. *See, e.g.*, Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, 2100 (codified at 23 U.S.C. § 101 (1994)); Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1322, 1390 (codified at 29 U.S.C. §§ 1501, 1781 (1994)); Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, 117 (codified at 42 U.S.C. §§ 6701-6736 (1994)). Since the advent of affirmative action, over 160 federal affirmative action programs have been established. Jeffrey A. Roberts and Steve Lipsher, *Vote '96: A question of color*, THE SUNDAY DENV. POST, Nov. 19, 1995, at A1, A16.

Although continuously controversial, media attention recently has focused on affirmative action due to the upcoming Presidential election. *See id.* (discussing the affirmative action positions of various Presidential hopefuls). For example, Robert Dole (R-Kan.) introduced legislation to eliminate affirmative action. *Id.* at A17. President Clinton supports affirmative action, but concedes that changes must be made. *Id.*; *see also* Adriel Bettelheim, *Preference in hiring a hot issue*, THE SUNDAY DENV. POST, Nov. 19, 1995, at A16 (describing Senator Hank Brown's (R-Colo.) role in the Senate hearings aimed at revamping federal affirmative action programs).

The Supreme Court developed three standards of review to analyze governmental classifications that purportedly violate an individual's equal protection rights.<sup>12</sup> The most lenient standard, the rational relationship test, grants a high level of deference to the legislature and requires that the classification be rationally related to a legitimate governmental purpose.<sup>13</sup> The middle level of review, intermediate scrutiny, demands that the governmental classification have a substantial relationship to an important governmental interest.<sup>14</sup> The most stringent standard, strict scru-

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11. Affirmative action programs do succeed in satisfying judicial scrutiny. *See, e.g., United States v. Paradise*, 480 U.S. 149, 185-86 (1987) (affirming a district court's imposition of a race-conscious remedy on the Alabama Department of Public Safety); *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980) (opinion of Burger, C.J.) (finding constitutional a ten percent minority business enterprise set-aside provision imposed by the federal government); *Peightal v. Metropolitan Dade County*, 815 F. Supp. 1454, 1471 (S.D. Fla. 1993) (upholding an affirmative action plan designed by Dade County to increase diversity among its firefighters), *aff'd*, 26 F.3d 1545 (11th Cir. 1994).

12. *E.g., NOWAK & ROTUNDA, supra* note 2, § 14.3; *Daly, supra* note 5, at 923-24; *Katz, supra* note 10, at 322-28; *Starks, supra* note 3, at 944-45.

13. *NOWAK & ROTUNDA, supra* note 2, § 14.3, at 601. Prior to the 1930s, the Supreme Court gave little deference to legislatures enacting economic legislation. *Id.* § 11.4, at 384. By the early 1930s, the Court began to depart from its stringent review of such legislation. *See Nebbia v. New York*, 291 U.S. 502, 537 (1934) (upholding state regulation of milk); *see also West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 394 (1937) (finding a Washington state minimum wage law constitutional).

Since then, the Court's application of the rational relationship test has resulted most often in the validation of economic and social welfare laws and regulations. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988) (upholding a rent control ordinance); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 594 (1979) (refusing to invalidate, under the rational relationship test, a New York Transit Authority policy forbidding the hiring of methadone users); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955) (finding a rational basis for a law limiting the ability to fit eyeglasses); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109-11 (1949) (applying the rational basis test to uphold a New York advertising law); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 537 (1949) (sustaining a "right-to-work" law). *But see Morey v. Doud*, 354 U.S. 457, 469 (1957) (holding that a law exempting currency exchanges of certain companies from statutory requirements violated equal protection), *overruled by City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

14. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (applying intermediate scrutiny to a federal minority preference program), *overruled in part by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (using intermediate scrutiny to review a law denying non-citizen school children the right to public schooling); *Craig v. Boren*, 429 U.S. 190, 199 (1976) (invalidating an Oklahoma statute that disallowed males, but allowed females, between eighteen and twenty years old to purchase beer). The Court in *Craig* articulated the test: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

The intermediate standard is much less deferential to the legislature and typically is applied in cases involving gender and illegitimacy classifications. *NOWAK & ROTUNDA, supra* note 2, § 14.3. *See generally* Ann E. Freedman, *Sex Equality, Sex Differences, and the*



tiny, requires that a classification be "necessary" or "narrowly tailored" to a "compelling" governmental purpose.<sup>15</sup> Racial classifications intentionally imposed by the government for invidious<sup>16</sup> reasons automatically

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*Supreme Court*, 92 YALE L.J. 913 (1983) (discussing gender classifications in employment). See also *Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting) (arguing that the Court's recent mandate for strict scrutiny review of all race-based affirmative action programs will make it easier for the government to enact gender-based affirmative action programs, as gender-based programs are subject to the less stringent intermediate review).

15. See, e.g., *Adarand*, 115 S. Ct. at 2113 (ordering strict scrutiny review of all federal, state, and local governmental race-based affirmative action programs); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) (calling for strict scrutiny review of a local minority business preference program based on race); *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984) (invalidating a judge's order that mandated the removal of a child from her mother because of her mother's marriage to a black man). Strict scrutiny review allows courts to make an independent assessment of a classification, giving little or no deference to the government's purported purpose. NOWAK & ROTUNDA, *supra* note 2, § 14.3.

The justification for applying strict scrutiny review to certain governmental classifications derives from Justice Stone's opinion in *United States v. Carolene Products*, 304 U.S. 144, 152 (1938) (applying the rational basis test to uphold legislation prohibiting the interstate shipment of filled milk). Justice Stone acknowledged, in footnote four, the potential need to apply "more exacting judicial scrutiny" to protect "discrete and insular minorities" from prejudice that "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.* at 152-53 n.4. See generally Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685 (1991) (discussing the impact of Justice Stone's reliance on the political powerlessness of minorities and his application to those disadvantaged under affirmative action programs).

Courts also apply strict scrutiny review in analyzing challenges to laws that restrict "fundamental rights," those rights protected by the Constitution as determined by the courts. NOWAK & ROTUNDA, *supra* note 2, § 11.4, at 383-84. In addition to the fundamental rights made explicit in the Bill of Rights, the Court recognizes additional rights, not specifically enumerated in the text of the Constitution, as fundamental. See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973) (including the right to have an abortion as part of the fundamental right to privacy); *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (recognizing a fundamental right to interstate travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (designating as fundamental the right to vote); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (invalidating a law that prohibited the use of contraceptives by married couples as an infringement of their right to privacy). Although they are not made explicit in the Constitution, the Supreme Court has nonetheless found that these rights are protected by various provisions of the Constitution, such as the First Amendment. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (recognizing that freedom of association is protected by the First Amendment); *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960) (same); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (same).

Courts have experienced difficulties in applying strict scrutiny review, especially in analyzing affirmative action programs involving race-based preferences. See *infra* note 241 (discussing lower courts' uncertainty in applying strict scrutiny to minority preference programs after *Croson*).

16. "Invidious" is defined as "arbitrary, irrational and not reasonably related to a legitimate purpose." BLACK'S LAW DICTIONARY 826 (6th ed. 1990). The Supreme Court, however, has not determined its interpretation of the term "invidious." Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*,

are subject to strict scrutiny review.<sup>17</sup> Where "benign" racial classifications are employed under affirmative action programs, however, the Court has alternated between the use of intermediate scrutiny and strict scrutiny review.<sup>18</sup>

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21 HASTINGS CONST. L.Q. 323, 327 (1994). "Invidious," as utilized by the Court, sometimes implies arbitrary. *Id.* Accordingly, some courts hold that statutes burdening individuals without an appropriate justification are unconstitutional. *See Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (voiding a statute that prevented illegitimate children from receiving damages for their mother's death).

The Court in other cases requires animus before finding a policy invidious. Strasser, *supra*, at 327. For example, the Court did not find unconstitutional a New York City transit policy that affected mostly black and Hispanic employees. *New York Transit Auth. v. Beazer*, 440 U.S. 568, 579 (1979). The Court apparently required some evidence of animus, such as intentional discrimination or bias. Strasser, *supra*, at 332.

In other situations, an invidious statute connotes one that adversely affects a fundamental right or a group. *Id.* at 332-36. In sum, the definition of "invidious" appears to change based on the type of case the Court addresses, and is therefore an elusive concept. *See id.* at 339 (suggesting that the Court clarify its definition of invidious by refraining from calling arbitrary laws and laws involving fundamental rights "invidious," and instead requiring some evidence of animus before labelling a law "invidious").

17. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that a race-based statute prohibiting interracial marriage failed "rigid" scrutiny). In *Loving*, a white man and a black woman, married in the District of Columbia, moved to Virginia and were subsequently indicted for violating a Virginia statute banning interracial marriages. *Id.* at 2-3. After pleading guilty, and receiving a suspended sentence for agreeing to move to the District of Columbia, the Lovings challenged the constitutionality of Virginia's anti-miscegenation statutes under the Fourteenth Amendment. *Id.* at 3. The Supreme Court reversed the convictions because, "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." *Id.* at 11. As the statute applied only to marriages involving white people, the Court found that the purpose could only be to further white supremacy. *Id.* Three years earlier, the Court applied "rigid" scrutiny to a Florida law prohibiting a black man and white woman, or a white man and a black woman, from occupying the same room at night. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Florida argued that the statute furthered the legitimate purpose of "prevent[ing] breaches of the basic concepts of sexual decency." *Id.* at 193. The Court acknowledged the importance of this purpose, but found no justification for punishing one racial group and not another for the same act. *Id.*; *see also* DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 53-62 (2d ed. 1980) (describing the origins and ultimate eradication of anti-miscegenation laws). Professor Bell discusses various theories attempting to explain the motivations underlying the anti-miscegenation laws. *Id.* at 62-69. For example, one commentator argued that the laws furthered economic exploitation of blacks and the desire to prevent blacks from attaining the cultural status of whites. *Id.* at 64. Few scholars, however, agree with this theory. *Id.* at 65. The more accepted view cites society's fear and contempt for interracial relations as the primary motivating factors behind these statutes. *Id.*

18. *Compare Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (applying intermediate scrutiny to a federal race-based affirmative action program), *overruled in part by Adarand*, 115 S. Ct. 2097 (1995) with *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1992) (opinion of O'Connor, J.) (utilizing the strict scrutiny standard to review a city's benign preference program). *See generally* NOWAK & ROTUNDA, *supra* note 2, § 14.10 (discussing the standards applied in determining the legitimacy of various affirmative action programs). *See also* *infra* notes 140-44 and accompanying text (discussing in

In a 1961 executive order,<sup>19</sup> President John F. Kennedy first directed the use of affirmative action, instructing employers to take "affirmative action" to ensure equal opportunity for workers.<sup>20</sup> President Lyndon B. Johnson furthered the federal commitment to equal employment opportunities in 1965 by signing Executive Order 11,246, requiring all federal agencies to establish equal employment plans.<sup>21</sup> Since then, affirmative action programs have been embroiled in endless controversy.<sup>22</sup> The le-

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detail the distinction between standards applied to federal and state affirmative action programs).

19. Exec. Order No. 10,925, 3 C.F.R. 448 (1961), *reprinted as amended in* 5 U.S.C. § 3301 (1994). Then Vice President Lyndon B. Johnson was instrumental in crafting the government's first affirmative attempt to provide blacks with equal opportunities. Starks, *supra* note 3, at 937-38. Prior to this executive order, however, the government used the term "affirmative action" in the Wagner Act of 1935, which instructed the National Labor Relations Board (NLRB) "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." National Labor Relations Act, Pub. L. No. 74-198, 449 Stat. 454 (1935).

20. DANIEL C. MAGUIRE, *A CASE FOR AFFIRMATIVE ACTION* 31 (1992). The Executive Order prohibited discrimination against employees and mandated the aggressive recruitment of minorities. See Lara Hudgins, Comment, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L. REV. 815, 819 (1995) (describing the history of affirmative action).

21. Exec. Order No. 11,246, 3 C.F.R. 339 (1965). Section 102 provided: "The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101." *Id.*

President Johnson recognized the need to take significant steps to open the doors of employment opportunity to those groups who had been shut out in the past because of racial discrimination. MAGUIRE, *supra* note 20, at 31.

Despite opposition, constitutional challenges to programs effected under this Order were rejected. See *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 177 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971) (upholding the Philadelphia Plan, an affirmative action program that required bidders on federally-funded construction projects to submit minority hiring goals, as valid under Executive authority).

The Philadelphia Plan was the government's first affirmative action program, addressing discrimination in the construction industry. Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893, 896 (1994). Due to controversy, the Plan was soon revoked. *Id.* The Nixon Administration, however, revived the Plan after eliminating the quota requirement of the original program. *Id.* See generally Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972) (discussing the history of the Philadelphia Plan).

George Shultz, former Secretary of Labor, assisted in creating the Philadelphia Plan in 1969. *George Shultz Backs Initiative to Scrap Affirmative Action*, L.A. TIMES, Feb. 23, 1996, at B3. Shultz, currently a professor at Stanford University, recently stated that affirmative action is "counterproductive." *Id.* He believes that "affirmative action programs have taken on a 'bureaucratic life of their own' and foster racial tensions." *Id.*

22. PERRY, *supra* note 3, at 155; see LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE* 556 (1992) (presenting a brief overview of the arguments for and against affirmative action programs). Proponents of affirmative action argue that people belonging to certain disadvantaged

gality of various aspects of the concept have culminated in multiple Supreme Court opinions.<sup>23</sup> Unfortunately, the Court's decisions have

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groups need special programs to remedy past bias and discrimination. *Id.* Opponents claim that such preferences victimize other groups and result in reverse discrimination. *Id.*; see also Braswell et al., *supra* note 6, at 401-18 (providing a detailed description of the arguments for and against affirmative action). Supporters argue affirmative action is necessary to remedy identifiable discrimination, discrimination that is specific and proven. *Id.* at 402-04. Indeed, the Supreme Court continuously has insisted upon evidence of identified discrimination before acknowledging the constitutionality of an affirmative action plan. *Id.* at 403; cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (rejecting the city's program because it was based on a "generalized assertion that there has been past discrimination in an entire industry"). Proponents also emphasize the need for affirmative action to remedy societal discrimination and to construct a racially integrated society. Braswell et al., *supra* note 6, at 404-06; see also *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566 (1990) (finding the promotion of "programming diversity" an important governmental objective based on congressional findings of discrimination against minorities in the communications industry), *overruled in part by* *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). Finally, those favoring affirmative action programs assert that these programs help to make reparations for the evils of slavery, and to equalize the preferences which were bestowed on whites for decades. Braswell et al., *supra* note 6, at 407-10. For example, Justice Marshall argued that the long-held position of inferiority held by blacks throughout history justifies affording blacks greater protection under the Fourteenth Amendment. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 401 (1977) (Marshall, J., dissenting). Justice Marshall further opined that because the doors of opportunity have been shut to blacks, by permitting government to consider race in deciding who shall occupy positions of power and prestige, the doors will open. *Id.* at 401-02.

Those who criticize affirmative action contend that such programs constitute reverse discrimination, and generate harmful effects by creating a stigma and imposing feelings of shame and inferiority on those receiving preferential treatment. See, e.g., *Adarand* 115 S. Ct. at 2119 (Thomas, J., concurring) (asserting that preference programs "stamp minorities with a badge of inferiority" and may "provoke resentment among those who believe that they have been wronged by the government's use of race"); *Croson*, 488 U.S. at 493 (opinion of O'Connor, J.) (warning that "[c]lassifications based on race carry a danger of stigmatic harm" and "may in fact promote notions of racial inferiority"). Opponents also argue that affirmative action fails to remedy the consequences of discrimination and is ineffective, failing to reach those who truly need its benefits. Braswell et al., *supra* note 6, at 416-17; see, e.g., Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 402-03 (1987) (arguing that the Supreme Court's approval of employment goals and timetables based on race and gender will not end employment discrimination); Paul M. Barrett, *SBA Minority Set-Aside Raises Questions*, WALL ST. J., Feb. 23, 1996, at B11 (questioning the disadvantaged status of a one-time millionaire who was presumed disadvantaged under the Small Business Act because of his Asian heritage); James P. Pinkerton, *Why Affirmative Action Won't Die*, FORTUNE, Nov. 13, 1995, at 192 (noting that opponents criticize affirmative action programs because they fail to help those most in need, such as the "bottom quintiles of the black community").

23. See, e.g., *Croson*, 488 U.S. at 511 (opinion of O'Connor, J.) (invalidating a city-wide affirmative action plan because the city failed to provide sufficient evidence of identifiable discrimination); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579 (1984) (limiting the scope of affirmative action programs to those that do not unduly burden the majority class); *United Steelworkers of America v. Weber*, 443 U.S. 193, 199-208 (1979) (upholding a plan that reserved 50% of the slots in an employee training program

failed to clarify the constitutionality of affirmative action programs.<sup>24</sup>

In its most recent affirmative action decision, *Adarand Constructors, Inc. v. Peña*,<sup>25</sup> the Supreme Court sought to add "consistency" and "congruence" to this area of the law.<sup>26</sup> The decision simplified affirmative action jurisprudence by mandating the application of strict scrutiny review to all preference programs that impose racial classifications.<sup>27</sup> The Court, however, failed to provide sufficient guidance to lower courts in their application of the strict scrutiny standard; for this reason, the confusion surrounding affirmative action is likely to endure.<sup>28</sup>

The Petitioner in *Adarand*, a subcontracting firm owned by a white male,<sup>29</sup> submitted the lowest bid for the guardrail portion of a federal highway construction project.<sup>30</sup> The Central Federal Lands Highway

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for black trainees as non-violative of Title VII's prohibition against racial discrimination in the work place); *Bakke*, 438 U.S. at 318-20 (opinion of Powell, J.) (allowing a California medical school to use race as one factor in its admissions process).

24. See MAGUIRE, *supra* note 20, at vii (prefacing his book by commenting on the Supreme Court's contribution to the confusion surrounding affirmative action). Maguire claims the Court has "struggled clumsily with this topic" and is the "fountainhead of this confusion." *Id.* at vii-viii; see also Jennifer M. Bott, *From Bakke to Croson: The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845, 847 (1990) (discussing the Supreme Court's failure, prior to *Adarand*, to establish a consistent standard for reviewing affirmative action cases); Michel Rosenfeld, *Metro Broadcasting, Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583, 593 (1991) (describing affirmative action jurisprudence as a "complex, tortuous, and fragmented landscape"). As a result of this confusion at the Supreme Court level, both affirmative action supporters and dissenters can derive support from "the ambiguities and inconsistencies embedded in the relevant judicial precedents." *Id.*

25. 115 S. Ct. 2097 (1995).

26. *Id.* at 2111. See *infra* notes 158-66 and accompanying text (explaining the majority's intent to uphold consistency and congruence in the Court's affirmative action jurisprudence).

27. *Adarand*, 115 S. Ct. at 2113. Justice O'Connor, writing for the majority, stated, "we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id.*

28. The Supreme Court remanded the case, directing the lower court to apply strict scrutiny to the minority preference program at issue, but giving the court little guidance concerning how that task should be accomplished. *Id.* at 2118; see *infra* notes 237-41 and accompanying text (discussing the limited guidance provided by the *Adarand* majority).

29. Randy Pech is the white owner of Adarand Constructors, Inc., located in Colorado Springs, Colorado. Jeff Thomas, *Denver summit reveals racial divide*, COLO. SPRINGS GAZETTE TEL., Nov. 19, 1995, at B6. Mr. Pech recently spoke out against the government's use of affirmative action programs at a summit called by the Colorado Democratic Leadership Council and the Colorado chapter of Jesse Jackson's Rainbow Coalition. *Id.* Mr. Pech stated that he competes with four other companies in Colorado, all of them owned by minorities and women. *Id.* One of them is three or four times bigger than Adarand. *Id.* "To tell me I don't get the contract and the only reason is I'm the white guy on top—that, to me, is repulsive." *Id.*

30. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2102 (1995).

Division, a branch of the United States Department of Transportation, awarded the prime contract to Mountain Gravel & Construction Company (Mountain Gravel).<sup>31</sup> Under the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA),<sup>32</sup> at least ten percent of the funds appropriated for the construction project had to be disbursed to small businesses owned by qualified "socially and economically disadvantaged individuals."<sup>33</sup> STURAA borrowed the definition of "disadvantaged" from the Small Business Act,<sup>34</sup> including the presumption that Blacks, Hispanics, Asian Pacifics, Subcontinent Asians, and Native Americans, as well as other groups designated by the Small Business Administration, are socially disadvantaged.<sup>35</sup>

The prime contractor in *Adarand* could receive a bonus of ten percent of the final subcontract amount if it employed at least one certified disadvantaged business.<sup>36</sup> Because Mountain Gravel would receive a mone-

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31. *Id.*

32. Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (1987).

33. *Id.* § 106(c)(1), 101 Stat. 145 (1987). The Act states in relevant part that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." *Id.*

34. *Id.* § 106(c)(2)(B), 101 Stat. 146 (1987). The Small Business Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5) (1994). The Act further defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A) (1994).

35. 49 C.F.R. § 23.62 (1994). Qualified third parties are permitted, by regulation, to challenge the "disadvantaged" status of a specific business. *Id.* § 23.69. A significant portion of the oral argument before the Supreme Court in *Adarand*, however, focused on whether or not third parties actually could or had ever challenged a "disadvantaged" designation. United States Supreme Court Official Transcript, *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995) available in No. 93-1841, 1995 WL 61020, at \*29-\*32. Justice Scalia asked the Government's attorney whether or not there were documented instances in which third parties, like *Adarand*, had successfully challenged an entity's status as a disadvantaged business. *Id.* at \*30. The attorney did not know of any. *Id.* Rather, the cases cited by the government involved situations where the procurement officer bore the burden of challenging the status of the business as disadvantaged. *Id.* at \*31-\*32. Justice Scalia suggested that this procedure indicates that the rebuttable presumption is in fact a conclusive presumption. *Id.* at \*31.

36. *Adarand*, 115 S. Ct. at 2103-04. The applicable clause in the prime contract included a "Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision," offering monetary compensation to the prime contractor for the hiring of disadvantaged subcontractors. *Id.* at 2103. Certification as a DBE could be granted by the United States Small Business Administration, or a state highway agency. *Id.* Certification by other governmental agencies could be acceptable on an individual basis. *Id.* at 2103-04. Evidence of the subcontractor's certification had to be presented to the engineer. *Id.* at

tary bonus for awarding the subcontract to a statutorily-defined socially and economically disadvantaged business, it chose Gonzales Construction Company, a certified Disadvantaged Business Enterprise (DBE), instead of the low bidder, Adarand.<sup>37</sup> Thereafter, Adarand filed suit against federal officials in the United States District Court for the District of Colorado claiming that the statutory race-based presumptions incorporated in the subcontract violated Adarand's rights under the equal protection component of the Fifth Amendment.<sup>38</sup> Applying intermediate scrutiny, the district court granted summary judgment in favor of the Government.<sup>39</sup> The Court of Appeals for the Tenth Circuit affirmed,<sup>40</sup> and the Supreme Court granted certiorari.<sup>41</sup>

Justice O'Connor delivered the majority opinion, with four Justices dissenting.<sup>42</sup> The majority held that all racial classifications imposed by any governmental actor<sup>43</sup> must be reviewed under strict scrutiny.<sup>44</sup> This deci-

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2104. The clause also described the extent of the financial bonus awarded to the prime contractor:

The Contractor will be paid an amount computed as follows:

1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.

*Id.*

37. *Id.* at 2102. Mountain Gravel's Chief Estimator conceded that Adarand's bid would have been accepted if not for the additional monetary incentive Mountain Gravel received for hiring the Gonzales Construction Company. *Id.*

38. *Id.* at 2104.

39. *Id.* The district court used the less rigorous standards of review illustrated in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled in part by Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), which also involved equal protection challenges arising under the Fifth Amendment. *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 243-44 (D. Colo. 1992), *aff'd sub nom. Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995). The district court granted summary judgment to the government after determining that the DBE program served important governmental objectives and was narrowly tailored to achieve these objectives. *Id.* at 244-45.

40. *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1547 (1994), *vacated*, 115 S. Ct. 2097 (1995). The Court of Appeals for the Tenth Circuit held that the DBE program was constitutional because it was narrowly tailored to achieve the significant governmental purpose of aiding disadvantaged businesses. *Id.*

41. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 41 (1994).

42. *Adarand*, 115 S. Ct. at 2101. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas formed the majority, while Justices Stevens, Souter, Ginsburg, and Breyer dissented. *Id.*

43. The Constitutional guarantee of equal protection of the laws limits only those acting on behalf of the government. *See United States v. Harris*, 106 U.S. (16 Otto) 629, 639-40 (1883) (invalidating, as beyond the scope of the Fourteenth Amendment, a statute that

sion overruled prior holdings that had imposed a less stringent standard of review on benign federal racial classifications than the standard imposed on benign state and local governmental racial classifications.<sup>45</sup> The majority rooted its decision in three fundamental propositions regarding racial classifications: skepticism, consistency, and congruence.<sup>46</sup> The majority's decision clearly resolved the question of which standard courts must use in reviewing all governmental affirmative action programs, yet it failed to sufficiently clarify the proper application of this standard, leaving affirmative action in a continued state of uncertainty.<sup>47</sup>

This Note first traces the history of equal protection jurisprudence in depth, focusing on the enforcement of equal protection rights in the realm of race discrimination under the Fourteenth and the Fifth Amendments. It next discusses the two different standards previously used to review invidious and benign racial classifications imposed by federal and state actors. This Note then summarizes the majority, concurring, and dissenting opinions in *Adarand*. An analysis of these differing opinions follows, concluding that the majority's decision to require strict scrutiny

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prohibited private individuals from conspiring to deny another equal protection of the laws). The Court stated:

As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution.

*Id.* at 640.

44. *Adarand*, 115 S. Ct. at 2113. The Court first found *Adarand* eligible for declaratory and injunctive relief from future subcontracts containing the monetary incentive clause. *Id.* at 2104-05. *Adarand* satisfied the two-part test, set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), used to determine whether a party has standing to seek prospective relief. *Id.* The test required *Adarand* to demonstrate that the future use of subcontractor compensation clauses would cause "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 2104 (quoting *Lujan*, 504 U.S. at 560) (citations omitted). *Adarand* met the first requirement because it alleged a particularized invasion of its right to equal protection of the laws. *Id.* at 2104-05. The Court also found that because *Adarand* proved that it bids on every guardrail project in Colorado, and on average, at least one and one half of the guardrail contracts per year contain a subcontractor compensation clause similar to the one in this case, the invasion was imminent. *Id.* at 2105. Thus, *Adarand* had standing to sue. *Id.* See generally Spann, *supra* note 3 (discussing the law of standing as applied to affirmative action).

45. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (applying intermediate scrutiny to two FCC affirmative action policies), *overruled in part by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). But see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) (requiring strict scrutiny review of Richmond's minority set-aside program).

46. *Adarand*, 115 S. Ct. at 2111; see also *infra* notes 153-66 and accompanying text (discussing the three propositions).

47. See *infra* notes 237-46 and accompanying text (discussing the uncertainty courts have had, and will have, applying strict scrutiny to affirmative action programs).



review of all governmental race-based affirmative action programs coincides with the underlying values of equal protection, but also invites further affirmative action litigation.

## I. EQUAL PROTECTION OF THE LAWS

### A. *Early Enforcement Under the Fourteenth and the Fifth Amendments*

Although the Equal Protection Clause of the Fourteenth Amendment does not apply exclusively to race discrimination,<sup>48</sup> the Court, in one of its earliest decisions following the adoption of the Fourteenth Amendment, invalidated a racially discriminatory West Virginia statute on the grounds that it violated equal protection.<sup>49</sup> The Court in that case acknowledged that the purpose of the Fourteenth Amendment was, in large part, to secure to the former slaves and their progeny "all the civil rights . . . enjoyed by white persons."<sup>50</sup> In later opinions, the Court attempted to further define the scope of the equal protection doctrine as it applied to the states.<sup>51</sup>

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48. DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 133 (1993); see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291-92 (1978) (opinion of Powell, J.) (explaining that despite the drafters' intent to protect the rights of the newly freed slaves, the broad terminology of the Fourteenth Amendment protects all people from all types of discrimination); see also *Anticau*, *supra* note 2, at 24-25 (same).

49. *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 310 (1879) (holding that a West Virginia statute, permitting only white males to serve as jurors, discriminated against black males on trial in violation of the Fourteenth Amendment). The applicable statute provided that "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." *Id.* at 305. The Court found that this law denied blacks equal protection by disallowing a black defendant to be tried by a jury that included members of his own race. *Id.* at 308-09. The Court conceded that laws requiring jurors to be males, citizens, and of a certain age and educational status, are valid. *Id.* at 310. Where the law excludes an individual from a jury panel "because of color alone," however, the law violates equal protection. *Id.* at 309.

50. *Id.* at 306.

51. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that the "separate but equal" doctrine was inappropriate in the context of education because segregation in public schools is inherently unequal); *Sweatt v. Painter*, 339 U.S. 629, 633-36 (1950) (finding that Texas's attempt to provide legal education for blacks at the Texas State University for Negroes was unequal to the education received by whites, and subsequently ordering the University of Texas Law School to admit a black man); *Sipuel v. Board of Regents*, 332 U.S. 631, 632-33 (1948) (compelling the University of Oklahoma to admit a black woman to its school of law); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (ordering the University of Missouri to admit a black man to the law school since no alternate legal institution existed for black people in the State); *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528, 543-45 (1899) (giving Virginia school board members substantial discretion in maintaining the equality of segregated high schools); *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896) (finding that the enforcement of separation by race in

While the Court struggled to apply the Equal Protection Clause consistently to race-based state statutes, it was slow to find a corresponding Fifth Amendment<sup>52</sup> federal equal protection guarantee.<sup>53</sup> In *Hirabayashi v. United States*,<sup>54</sup> the Court first reviewed a challenge to a race-based federal statute, failing to find an equal protection guarantee in the Fifth Amendment.<sup>55</sup> In *Hirabayashi*, an American citizen of Japanese ancestry was convicted of violating the Act of March 21, 1942,<sup>56</sup> by ignoring a wartime curfew imposed only on individuals of Japanese descent.<sup>57</sup> *Hirabayashi* challenged the curfew as discriminatory.<sup>58</sup> Although the Court agreed that distinctions based on ancestry "are by their very nature odious to a free people," it nevertheless upheld the curfew and the convic-

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public accommodations did not violate equal protection), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

52. U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Id.*

53. *See, e.g.*, *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943) (noting that the Fifth Amendment does not protect individuals against discriminatory legislation enacted by Congress); *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941) (opining that "[a] claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause"); *LaBelle Iron Works v. United States*, 256 U.S. 377, 392 (1921) (stating that "[t]he Fifth Amendment has no equal protection clause").

54. 320 U.S. 81 (1943).

55. *Id.* at 100. The Court stated that the Fifth Amendment's Due Process Clause is the only limit on Congress's ability to legislate discriminatorily. *Id.*

56. *Id.* at 83. The Act provided:

[W]hoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, . . . shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable. . . .

*Id.* at 87-88 (quoting Act of March 21, 1942, 18 U.S.C. § 97(a) (1942)).

57. *Id.* at 83-84. The Court determined that Congress had the authority to enact this legislation based on exigencies created by World War II. *Id.* at 93-95. In dealing with the "perils of war," including the dangers of espionage and sabotage by Japanese-Americans, and the threat of invasion, the Court held that Congress had the power to take into account facts and circumstances necessary to the protection of the public welfare. *Id.* at 100-01. In effect, the Court applied the rational basis test. *Id.* at 101-02.

58. *Id.* at 100.

tion because of the importance of ensuring national defense during a time of war.<sup>59</sup>

Shortly thereafter, in *Korematsu v. United States*,<sup>60</sup> the Court faced a similar challenge to a federal wartime order that excluded Japanese persons from certain areas of the West Coast.<sup>61</sup> It again upheld the order as necessary to the prevention of wartime espionage and sabotage.<sup>62</sup> Before doing so, however, the Court expressed its distaste for racial classifications by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and should be subject to the "most rigid scrutiny."<sup>63</sup> Courts frequently have relied upon this brief dictum to determine the applicable standard of review for evaluating governmental racial classifications purportedly violative of the equal protection guarantee of both the Fifth and the Fourteenth Amendments.<sup>64</sup>

### *B. Federal Duty to Uphold Equal Protection of the Laws is the Same as the State*

Although not explicitly stated until several years after *Hirabayashi* and *Korematsu*,<sup>65</sup> the Supreme Court began to invalidate federal laws employing race classifications under the Fifth Amendment's Due Process

59. *Id.* at 102.

60. 323 U.S. 214 (1944).

61. *Id.* at 215-16. The Court compared the case to *Hirabayashi*, holding that the exclusionary order at issue, while more intrusive than the curfew in *Hirabayashi*, had a "definite and close relationship" to preventing wartime threats. *Id.* at 217-18.

62. *Id.* at 218-19. Justice Murphy dissented, arguing that the exclusionary order "falls into the ugly abyss of racism." *Id.* at 233 (Murphy, J., dissenting). He further stated, "[b]eing an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment." *Id.* at 234-35.

Congress has recently acknowledged the injustices imposed on Japanese Americans during World War II, and has tried to make amends. See Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified as amended at 50 U.S.C. § 1989a(a) (1994)) (recognizing the "grave injustice" incurred by individuals of Japanese ancestry); see also *id.* § 1989b-4(a)(1) (providing restitution for eligible injured parties).

63. *Korematsu*, 323 U.S. at 216.

64. See, e.g., *Wittmer v. Peters*, 904 F. Supp. 845, 849-50 (C.D. Ill. 1995) (citing *Hirabayashi* as justification for finding racial classifications irrelevant and therefore prohibited); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978) (opinion of Powell, J.) (quoting *Hirabayashi* and *Korematsu* for the proposition that racial distinctions are innately suspect and warrant exacting judicial review); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (citing prior case law for the proposition that heightened scrutiny is necessary to eliminate governmental racial discrimination); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (calling for strict review of racial classifications imposed by the federal government).

65. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (expressly stating that the "Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment").

Clause using an implicit equal protection concept.<sup>66</sup> In *Bolling v. Sharpe*,<sup>67</sup> the Supreme Court banned, on due process grounds, segregation in the District of Columbia's public school system.<sup>68</sup> Acknowledging that there is no explicit Equal Protection Clause in the Fifth Amendment, the Court recognized that the Fifth Amendment's Due Process Clause stems from a similar notion of fairness.<sup>69</sup> The Court reiterated an earlier premise set forth in *Gibson v. Mississippi*<sup>70</sup> that the duty of the federal government to avoid racial classifications should be the same as that of the states.<sup>71</sup>

The Court continued to rely on the theory that the federal and state obligation to uphold equal protection of the laws must be consistent.<sup>72</sup> In *McLaughlin v. Florida*,<sup>73</sup> the Court faced a challenge to a Florida statute prohibiting black men and white women, or black women and white men,

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66. See *Bolling*, 347 U.S. at 500 (finding it impossible that the Constitution would impose lesser requirements on the federal government to uphold citizens' equal protection rights than it would on state governments).

67. 347 U.S. 497 (1954).

68. *Id.* at 500 (holding that racial segregation is an improper governmental objective, constituting a denial of due process).

69. *Id.* at 499. The Court conceded that "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," but nonetheless acknowledged that racial discrimination without justification could violate due process. *Id.*

70. 162 U.S. 565 (1896). The *Gibson* Court, addressing an allegation of discrimination brought against the state of Mississippi in its jury selection for the murder trial of a black man, articulated the proposition that discrimination by both the "General Government" and the states is forbidden by the Constitution. *Id.* at 591. The Court stated:

All citizens are equal before the law. The guarantees of life, liberty and property are for all persons, within the jurisdiction of the United States, or of any State, without discrimination against any because of their race. Those guarantees, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the Nation and of the State, without reference to considerations based upon race.

*Id.*

71. *Bolling*, 347 U.S. at 500. The Court stated that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on the states. *Id.*; see Karst, *supra* note 1, at 554 (noting that courts assess Fifth Amendment equal protection challenges using Fourteenth Amendment equal protection precedents).

72. See *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (relying on the *Bolling* decision to invalidate, under the Fifth Amendment's Due Process Clause, a federal statute that discriminated against naturalized citizens). In *Schneider*, the State Department refused to grant a passport to a German national who had acquired American citizenship but had lived in Germany for several years. *Id.* at 164. The Department based its decision on a law that called for termination of citizenship for naturalized citizens who had resided for three years in their place of birth or the place where they were formerly a national. *Id.* The Court found that this statute unjustifiably discriminated against naturalized citizens, in violation of the Fifth Amendment's due process guarantee, as it was based on the impermissible assumption that naturalized citizens are less loyal to the United States. *Id.* at 168.

73. 379 U.S. 184 (1964).

from occupying the same bedroom at night.<sup>74</sup> Using prior decisions involving federal race-based statutes as precedent, the Court invalidated this state law because it violated equal protection.<sup>75</sup>

Similarly, in *Loving v. Virginia*,<sup>76</sup> the Court borrowed the equal protection principles enumerated in earlier decisions involving federal race-based statutes to sustain an equal protection challenge to a state statute.<sup>77</sup> *Loving* argued that a Virginia law banning interracial marriages violated the Fourteenth Amendment.<sup>78</sup> The Supreme Court agreed, citing *Hirabayashi* and *Korematsu* to explain why distinctions based solely upon race encroach the doctrine of equality embedded in the Constitution.<sup>79</sup>

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74. FLA. STAT. ANN. § 798.05 (West 1992) (repealed 1969). The applicable statute stated:

Negro man and white woman or white man and Negro woman occupying same room: 'Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.'

*McLaughlin*, 379 U.S. at 185 n.1 (quoting FLA. STAT. ANN. § 798.05 (West 1992) (repealed 1969)).

75. *McLaughlin*, 379 U.S. at 192-96. Noting that the purpose of the Fourteenth Amendment was to ensure the elimination of state-supported racial discrimination, the Court held that racial classifications are "constitutionally suspect." *Id.* at 192 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). The Court continued by observing that such classifications are therefore subject to the "most rigid scrutiny." *Id.* (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

76. 388 U.S. 1 (1967).

77. *Id.* at 11. The *Loving* Court quoted text from *Hirabayashi* and *Korematsu* to denounce laws based on racial distinctions. *Id.*

78. *Id.* at 3; see also *supra* note 17 (discussing the facts of *Loving*). The Virginia statute provided in pertinent part: "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." *Loving*, 388 U.S. at 4 n.3 (quoting VA. CODE ANN. § 20-57 (Michie 1960) (repealed 1968)). The statute defined white person as "such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons." *Id.* (quoting VA. CODE ANN. § 20-54 (Michie 1960) (repealed 1968)).

At the time of the *Loving* litigation, sixteen states, including Virginia, had laws prohibiting and punishing interracial marriages: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia. *Loving*, 388 U.S. at 6 n.5. Fourteen states already had repealed laws banning interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. *Id.*

79. *Loving*, 388 U.S. at 11. Relying on earlier decisions involving federal statutes, the Court noted that "this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* (quoting *Hirabayashi*, 320 U.S. at 100). Referring to the standard of review of such distinctions, the Court held that "the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny.'" *Id.* (quoting *Korematsu*, 323 U.S. at 216). The

Subsequently, in a series of decisions arising under the Fifth Amendment, the Court clearly articulated that the federal government's obligation to uphold equal protection rights, including racial, gender, and ethnic equality, cannot be distinguished from that of the states.<sup>80</sup> In *Weinberger v. Wiesenfeld*,<sup>81</sup> the Court found that a federal gender-based distinction in social security benefits violated equal protection rights guaranteed by the Due Process Clause of the Fifth Amendment.<sup>82</sup> While acknowledging that there is no Equal Protection Clause in the Fifth Amendment, the Court justified its analysis based on the proposition that equal protection claims arising under the Fifth Amendment have been "precisely the same" as like claims arising under the Fourteenth Amendment.<sup>83</sup> Similarly, in *Buckley v. Valeo*,<sup>84</sup> the Court explicitly stated that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."<sup>85</sup> Thus, the Court has foreclosed any attempt to deny the existence of an equal protection guarantee under the Fifth Amendment.

### C. Judicial Analysis of Facially Discriminatory Race-Based Laws

#### 1. Invidious Racial Discrimination

Throughout the struggle to identify a Fifth Amendment equal protection guarantee, the Court developed a framework for analyzing allegedly race-based discriminatory legislation enacted by both the federal and

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Court recognized that the State has the power to regulate marriages, but rejected Virginia's argument that the statute was valid because it applied equally to whites and blacks. *Id.* at 7-8. Because the statute solely prohibited interracial marriages involving whites, but not other races, the Court found that the statute's underlying purpose of maintaining "White Supremacy" violated equal protection. *Id.* at 11-12. The statute also violated the Due Process Clause of the Fourteenth Amendment by infringing the fundamental right to freedom of choice in marriage. *Id.* at 12.

80. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (concluding that a social security benefits provision utilizing a gender-based distinction violated the Fifth Amendment's Due Process Clause); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (holding that the Navy's mandatory discharge statute, which treated women differently than men, did not violate equal protection under the Fifth Amendment); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) (finding a federal law that classified persons based on illegitimacy violated the guarantees of equal protection implicit in the Fifth Amendment's Due Process Clause).

81. 420 U.S. 636 (1975).

82. *Id.* at 653.

83. *Id.* at 638 n.2.

84. 424 U.S. 1 (1976) (per curiam). Certain federal officeholders and candidates challenged the Federal Elections Campaign Act of 1971 on several constitutional grounds, including an alleged equal protection violation resulting from purported discrimination against new parties seeking to run for federal office. *Id.* at 6-8, 11.

85. *Id.* at 93.

state governments.<sup>86</sup> Currently labeled the "strict scrutiny" standard,<sup>87</sup> the Court utilizes this high level of scrutiny for statutory race-based distinctions because such distinctions are naturally "odious to a free people whose institutions are founded upon the doctrine of equality."<sup>88</sup>

The "strict scrutiny" standard involves a specific methodology refined by the Supreme Court.<sup>89</sup> Although the Court previously had applied what often amounted to a strict scrutiny analysis, it clearly articulated the

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86. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (calling for "the most rigid scrutiny" of racial classifications). The Court utilizes a stringent standard of review when analyzing facially discriminatory statutes. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (voiding a state statute that discriminated against blacks in marriage); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (adjudging a Florida penal statute using "rigid scrutiny"). The Court also invalidates statutes that are neutral on their face, but that unconstitutionally discriminate in effect. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (finding that Tuskegee, Alabama's municipal boundaries were redrawn to exclude blacks from voting districts); *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (holding that an Oklahoma statute governing voter registration was unduly burdensome on blacks); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (dismissing as arbitrary and discriminatory a municipal ordinance that prevented Chinese people from operating laundries in San Francisco). In *Yick Wo*, the city of San Francisco passed an ordinance requiring all persons owning laundries in wooden buildings to obtain a permit from the board of supervisors. *Id.* at 358. The board denied permits to more than 200 Chinese people operating laundries in wood buildings, but granted permits to 80 non-Chinese owners of wooden laundries. *Id.* at 374. The Court found that the facts clearly established discrimination in administration of the law:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

*Id.* at 373-74. But see *Washington v. Davis*, 426 U.S. 229, 242 (1976) (concluding that evidence of a law's disparate impact on one race, by itself, is not enough to support a finding of unlawful discrimination).

87. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-13 (1995) (calling for strict scrutiny review of federal affirmative action programs); see also *supra* note 15 and accompanying text (describing the strict scrutiny test).

88. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Justice O'Connor explained the importance of strictly scrutinizing governmental racial classifications:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.).

89. See *Adarand*, 115 S. Ct. at 2113 (mandating strict scrutiny review of all governmental use of racial classifications by requiring that such classifications be "narrowly tailored measures that further compelling governmental interests"); see also *supra* note 15 and accompanying text (discussing the strict scrutiny test).

strict scrutiny standard in *Palmore v. Sidoti*,<sup>90</sup> requiring governmentally-imposed racial classifications to be "necessary . . . to the accomplishment" of a compelling purpose.<sup>91</sup> Until the 1970s, courts applied this standard when determining the validity of *any* statutorily imposed racial classifications governed by the Fifth and the Fourteenth Amendments.<sup>92</sup>

## 2. Benign Racial Discrimination

### a. State and Local Governments

Just as the Supreme Court has analyzed the constitutionality of governmental racial classifications that restrict individual rights, the Court also has scrutinized state-imposed racial classifications aimed at benefitting individuals of a particular race.<sup>93</sup> In *Regents of the University of California v. Bakke*,<sup>94</sup> the Court for the first time<sup>95</sup> attempted to determine the ap-

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90. 466 U.S. 429 (1984).

91. *Id.* at 432-33 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964)).

92. In the early 1970s, the Court began to entertain claims of Title VII employment violations. Janoff, *supra* note 5, at 1017. The Court allowed employers to utilize racial preferences to further Title VII's purpose of increasing employment opportunities for minorities. *Id.* at 1019. Thereafter, public and private employers began to implement affirmative action programs that were subsequently challenged in the courts. *See, e.g.*, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 577 (1984) (invalidating an affirmative action layoff plan that dismantled a traditional seniority system, because it unduly burdened whites in violation of Title VII); *United Steelworkers of America v. Weber*, 443 U.S. 193, 197 (1979) (upholding an employer/union plan that reserved 50% of the available positions in a training program for minorities).

93. *See, e.g.*, *Croson*, 488 U.S. at 469 (affirmative action in construction contracting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion) (affirmative action in employment); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (affirmative action in education).

94. 438 U.S. 265 (1978). *Bakke* produced a variety of opinions. Justice Powell authored an opinion announcing the judgment of the Court. *Id.* at 267. Justice White joined in Parts I, III-A, and V-C. *Id.* Justices Brennan, Marshall, and Blackmun joined in Parts I and V-C. *Id.* Justices Brennan, White, Marshall, and Blackmun concurred in the judgment in part, and dissented in part. *Id.* at 267-68. Justices White, Marshall, and Blackmun each filed separate opinions. *Id.* at 268. Finally, Justice Stevens joined by Chief Justice Burger and Justices Stewart and Rehnquist filed an opinion concurring in the judgment in part and dissenting in part. *Id.*

95. The issue actually arose a few years before *Bakke*, in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), in which the Supreme Court faced its first equal protection challenge to an affirmative action program. *Id.* at 314. In that case, the petitioner, a white male, sued the University of Washington Law School for giving preferential treatment to minorities in the admissions process. *Id.* The Supreme Court did not address the standard of review issue, however, because an earlier court order granting the petitioner's admission to the school rendered the question moot. *Id.* at 319-20.

Following the *DeFunis* decision, opponents of affirmative action first began to express concern about the phenomenon of "reverse discrimination." W.H. Knight & Adrien Wing, *Weep Not, Little Ones: An Essay to Our Children About Affirmative Action*, reprinted in *AFRICAN AMERICANS AND THE LIVING CONSTITUTION* 218 (John H. Franklin & Genna R.



propriate level of scrutiny for benign race-based classifications.<sup>96</sup> Justice Powell argued for strict scrutiny based on the history of the Fourteenth Amendment,<sup>97</sup> and the past use of the Equal Protection Clause as a protection for all races, not just the "Negro minority."<sup>98</sup>

Justice Brennan and three other Justices argued for the application of less stringent standard of review when the burdened individual is not a member of a suspect class.<sup>99</sup> While they recognized the importance of

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McNeil eds., 1995); see also Charles Fried, *Forward: Revolutions?*, 109 HARV. L. REV. 13, 46 (1995) (discussing the advent of the subject of reverse discrimination). Judge Fried defines reverse discrimination as "explicit, firm racial preferences benefiting historically disadvantaged groups and especially the descendants of those whose oppression it was a principal purpose of the Fourteenth Amendment to reverse." *Id.*

96. *Bakke*, 438 U.S. at 287-88 (opinion of Powell, J.). Allan Bakke challenged the University of California at Davis's Medical School admissions policy, which granted special treatment to certain minority applicants, including Blacks, Chicanos, Asians, and American Indians, with the aim of diversifying the student population. *Id.* at 272-74. The minority student applications were evaluated by a special admissions committee and were treated like "regular" applications, except that minority applicants did not have to meet the 2.5 grade point average required of other applicants. *Id.* at 275. Sixteen seats in the entering class were reserved for the best minority applicants. *Id.* The school twice refused Bakke admission, while admitting minority students who were arguably less qualified than Bakke. *Id.* at 276-77. Bakke subsequently filed suit in the Superior Court of California seeking an injunction to compel his admission. *Id.* at 277. The trial court held the admissions program unconstitutional, but refused to order Bakke's admission. *Id.* at 279. Bakke appealed, and the Supreme Court granted certiorari. *Id.* at 279-81.

97. *Id.* at 291 (arguing that racial distinctions are "inherently suspect" and demand "the most exacting judicial examination"). Justice Powell noted that although the Fourteenth Amendment originally was enacted to secure equality for the newly emancipated slaves, the drafters framed the language of the amendment in "universal terms" to ensure equality for all persons. *Id.* at 292-93.

98. *Id.* at 292-95. Justice Powell cited several equal protection claims brought by members of ethnic groups other than African-Americans. *Id.* at 292 (citing *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican-Americans); *Truax v. Raich*, 239 U.S. 33 (1915) (Austrian resident aliens); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Chinese); *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303 (1880) (Celtic Irishmen) (dictum)). Indeed, the Fourteenth Amendment protects all races, including whites. See *supra* note 3 (examining the broad terminology of the Fourteenth Amendment).

In applying the strict scrutiny test, Justice Powell found that the University's desire to attain greater diversity through the affirmative action plan was "clearly . . . a constitutionally permissible goal" for an institution of higher learning. *Bakke*, 438 U.S. at 311-12. Thus, the goal satisfied the compelling interest prong of the strict scrutiny test. *Id.* at 314-15.

Because the program reserved sixteen seats for minorities, however, it prevented non-minority individuals from competing for those seats solely because of race. *Id.* at 319-20. In addition, because the program focused solely on race, it hindered rather than furthered the attainment of "genuine" diversity. *Id.* at 315. Thus, the program was not narrowly tailored to furthering the valid goal of diversity, thereby infringing an applicant's Fourteenth Amendment rights. *Id.* at 320. A better program would involve the "competitive consideration of race and ethnic origin" as one factor in the admissions process. *Id.*

99. *Bakke*, 438 U.S. at 357 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

remedial legislation, these Justices noted that attempts to alleviate the effects of past discrimination through benign statutory classifications may exacerbate the harm.<sup>100</sup> To balance these competing interests, the Justices argued for the use of a heightened standard of review resembling intermediate scrutiny.<sup>101</sup>

Justice Stevens, joined by three other Justices, concurred in the judgment, but asserted that the result should have been statutorily based.<sup>102</sup> The variety of opinions in *Bakke* left the applicable standard of review for benign governmental classifications largely unresolved.<sup>103</sup>

In *Wygant v. Jackson Board of Education*,<sup>104</sup> the Court again faced a Fourteenth Amendment equal protection challenge involving benign racial classifications.<sup>105</sup> A majority of the Court held the provision invalid.<sup>106</sup> As in *Bakke*, Justice Powell argued for strict scrutiny analysis, noting that the "reasonableness" standard applied by the court of appeals

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100. *Id.* at 360-61. The Justices warned of the stigma that may result from governmental attempts to remedy past racial discrimination. *Id.* at 360. Such preferential actions would reinforce the views of those individuals who already believe that racial minorities cannot succeed on their own. *Id.* This negative effect is often cited by those opposing affirmative action programs. See *supra* note 22 (discussing the arguments for and against affirmative action programs).

101. *Bakke*, 438 U.S. at 359. According to these four Justices, benign racial classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

102. *Id.* at 411-12 (Stevens, J., concurring in the judgment in part and dissenting in part). Justice Stevens argued that section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d (1994), prohibited the University of California from excluding any individual from its medical school program based on race because the University received federal financial aid. *Id.* at 412. Accordingly, the Justices asserted that the statutory violation justified the Court's judgment. *Id.*

103. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2108 (1995) (discussing the *Bakke* opinions).

104. 476 U.S. 267 (1986) (plurality opinion). Justice Powell announced the judgment of the Court and authored an opinion joined by Chief Justice Burger and Justice Rehnquist. *Id.* at 268. Justice O'Connor also joined in this opinion except for Part IV. *Id.* Justice O'Connor filed a separate opinion concurring in part and in the judgment. *Id.* Justice White filed an opinion concurring in the judgment. *Id.* Justice Marshall filed a dissenting opinion joined by Justices Brennan and Blackmun. *Id.* Finally, Justice Stevens authored a separate dissenting opinion. *Id.*

105. *Id.* at 269-70 (opinion of Powell, J.). In this case, non-minority teachers challenged a Michigan school board's decision to grant minority teachers preferential treatment during layoffs. *Id.* at 270-72.

106. *Id.* at 284 (opinion of Powell, J.), 295 (opinion of White, J., concurring in the judgment). Justice Powell found that the school district's goal of alleviating societal discrimination, by granting preferential treatment in layoffs to minority teachers, was not a compelling purpose because it was "too amorphous a basis for imposing a racially classified remedy." *Id.* at 276 (opinion of Powell, J.). Note that this purpose was more remedial in nature than the achievement of diversity purpose in *Bakke*. See *supra* note 98 (describing the University of California's goal of diversity).

had no merit.<sup>107</sup> Applying strict scrutiny, Justice Powell found that general "societal discrimination" could not justify governmental racial distinctions; rather, the government had to make a specific showing of prior discrimination.<sup>108</sup> Justice O'Connor concurred in part and in the judgment, agreeing to the need for a high level of scrutiny in examining benign racial classifications.<sup>109</sup> Justice O'Connor noted, however, the difficulties inherent in a means-ends analysis.<sup>110</sup> Dissenting, Justice Marshall argued that the school board's racial classification survived judicial scrutiny.<sup>111</sup>

In *City of Richmond v. J.A. Croson Co.*,<sup>112</sup> the Court examined a chal-

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107. *Wygant*, 476 U.S. at 279 (opinion of Powell, J.). The Sixth Circuit relied on the district court's reasoning that the school board's goals of providing minority role model teachers to ameliorate past societal discrimination was important enough to justify the utilization of racial criteria in the layoff policy. *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152, 1156-57 (6th Cir. 1984), *rev'd*, 476 U.S. 267 (1986).

108. *Wygant*, 476 U.S. at 274 (opinion of Powell, J.). Justice Powell determined that the discrepancy between the percentage of minority students and the percentage of minority teachers could be explained by numerous factors unrelated to discrimination. *Id.* at 276. Remedies based on such evidence of "societal discrimination" are "over-expansive." *Id.*

This view coincides with Justice Powell's previous opinion in *Bakke*, where he rejected the University of California's goal of remedying the effects of societal discrimination. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-09 (1978) (opinion of Powell, J.). He stated, "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* at 307.

109. *Wygant*, 476 U.S. at 285-86 (O'Connor, J., concurring in part and in the judgment). Justice O'Connor noted that the challenging non-minority teachers had the burden of proof to show that the layoff policy was not "narrowly tailored." *Id.* at 294. In her opinion, the teachers met their burden by demonstrating that the government's purpose was linked to a hiring goal that had no relation to eliminating discrimination in the work place. *Id.*

110. *Id.* at 287. The Justices disagreed in their determination of how well the affirmative action program achieved the constitutional goal of eliminating identified discrimination. *Id.*

111. *Id.* at 302-03 (Marshall, J., dissenting). Justice Marshall rooted his dissent in the "longstanding goal of civil rights reform," namely, to eliminate segregation and to integrate public schools. *Id.* at 305. He argued that the school board's policy attempted to do just that. *Id.*

In scrutinizing the goal of the layoff plan, Justice Marshall argued that the case should be remanded in light of the extrinsic evidence supporting the school board's need for the affirmative action plan. *Id.* at 306. He further asserted that this evidence would establish a valid purpose. *Id.* Justice Marshall also found that the plan attained its goal in the least burdensome manner. *Id.* at 310. He noted that no member of the Court, himself included, could suggest a more narrowly tailored program. *Id.*

112. 488 U.S. 469 (1989). Justice O'Connor, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy, authored the opinion of the Court and announced the judgment of the Court in Parts I, III-B, and IV. *Id.* at 475. Chief Justice Rehnquist and Justice White joined in Part II of Justice O'Connor's opinion. *Id.* Chief Justice Rehnquist and Justices White and Stevens joined in Part III-A and V of Justice O'Connor's opinion.

lenge to a municipal minority business set-aside program.<sup>113</sup> For the first time, a majority of the Supreme Court determined that strict scrutiny review should govern all benign uses of racial classifications by state and local governments.<sup>114</sup> Agreeing with Justice Powell's opinion in *Bakke*, Justice O'Connor noted the importance of preventing the "stigmatic

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*Id.* Justice Stevens filed an opinion concurring in part and in the judgment. *Id.* Justice Kennedy filed an opinion concurring in part and in the judgment. *Id.* Justice Scalia filed an opinion concurring in the judgment. *Id.* Justice Marshall authored a dissenting opinion joined by Justices Brennan and Blackmun. *Id.* Finally, Justice Blackmun filed a dissent joined by Justice Brennan. *Id.*

113. *Id.* at 477. J.A. Croson Co. (Croson), a plumbing and heating contractor, challenged the city of Richmond's affirmative action program, which required prime contractors working on city contracts to subcontract at least thirty percent of the contract's total amount to at least one Minority Business Enterprise (MBE). *Id.* The Richmond Minority Business Utilization Plan defined a MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." *Id.* at 478 (quoting RICHMOND, VA CITY CODE § 12-23 (1985) [hereinafter CITY CODE]). The plan further defined "minority group members" as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* (quoting CITY CODE § 12-23). The declared purpose was to promote "wider participation by minority business enterprises in the construction of public projects." *Id.* (quoting CITY CODE § 12-158(a)).

Croson decided to bid as the prime contractor to install plumbing fixtures in a city jail. *Id.* at 481-82. He contacted several registered MBEs to serve as supplier of the fixtures, and eventually discovered that Continental Metal Hose (Continental) was willing to submit a bid. *Id.* at 482. Continental had difficulty obtaining a credit check by the city's deadline, however, and failed to submit a bid to Croson. *Id.* Consequently, Croson submitted the bid including itself as supplier and applied for a waiver of the MBE requirement. *Id.* The waiver form explained that Continental was not qualified, and that the other MBEs did not respond. *Id.* Continental eventually submitted its own bid to the city, raising the total price of Croson's bid by \$7,663.16. *Id.* at 482-83. The city denied Croson's waiver request, as well as his subsequent request to raise the prime contract price by the amount of the difference. *Id.* The city then indicated its decision to reopen the bidding, and Croson requested a review of the waiver denial. *Id.*

The city refused to review its decision, leaving Croson no option to appeal. *Id.* Croson subsequently filed suit in United States District Court for the Eastern District of Virginia, alleging the unconstitutionality of the ordinance on its face and as applied. *Id.* Both the district court and the United States Court of Appeals for the Fourth Circuit upheld the ordinance. *Id.* at 483-84.

On its first review of the case, the Supreme Court vacated the Fourth Circuit's decision, and remanded the case for reconsideration in light of the intervening decision in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion). *Id.* at 485. The Fourth Circuit found that the minority set-aside plan failed both prongs of the strict scrutiny test; the city appealed, and the Supreme Court again granted certiorari. *Id.* at 485-86.

114. *Id.* at 493 (opinion of O'Connor, J.). Justice O'Connor announced the strict scrutiny mandate in part III-A of the opinion, in which Chief Justice Rehnquist, Justice White, and Justice Kennedy joined. *Id.* at 493-98. Justice Scalia concurred in judgment, and in the conclusion that strict scrutiny should apply. *Id.* at 520 (Scalia, J., concurring in judgment) (stating that, "I agree with much of the Court's opinion, and, in particular, with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'"). Thus, a majority of the Court held that strict scrutiny is the proper standard to apply to state or local

harm" that may result from the government's improper use of remedial racial classifications.<sup>115</sup> Additionally, she agreed that the standard of review should not depend on the race of those burdened by the classification.<sup>116</sup>

The Court then discussed the factual findings needed to survive the first prong of strict scrutiny review.<sup>117</sup> Quoting Justice Powell, Justice O'Connor reasserted the proposition that justifying a remedial racial classification by presenting a general history of discrimination is not sufficient, because such justifications are "ageless in their reach into the past, and timeless in their ability to affect the future."<sup>118</sup> The Court found insufficient the evidence offered to support the Richmond plan, including a generalized assertion of racial discrimination in that region's construction industry.<sup>119</sup> The Court also found it nearly impossible to determine whether the set-aside program was "narrowly tailored" because there was no compelling interest.<sup>120</sup> Thus, Justice O'Connor asserted that the Rich-

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governmental race-based classifications. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2110 (1995).

115. *Croson*, 488 U.S. at 493 (opinion of O'Connor, J.). Justice O'Connor quoted Justice Powell's proposition that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." *Id.* at 494 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.)).

116. *Id.* at 494. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Id.* (quoting *Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.)).

117. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-500 (1989). The purported purpose of the Richmond plan was remedial in nature, aimed at alleviating the current effects of past discrimination in the construction industry. *Id.* at 498. The factual findings presented by the city, however, failed to necessitate remedial action. *Id.* at 500.

118. *Id.* at 498 (opinion of O'Connor, J.) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (opinion of Powell, J.)); see *supra* note 108 and accompanying text (discussing the rejection of prior societal discrimination as a compelling purpose).

119. *Croson*, 488 U.S. at 500. Additional findings also failed to satisfy the Court's requirement of specific discrimination in the Richmond construction industry. *Id.* at 500-05. The Court examined the city's evidence, including: (1) the city's designation of the program as remedial, (2) statistical disparities between the size of the minority population in Richmond and the number of contracts awarded to minorities, (3) data indicating membership of minority contractors in the local contractors' associations was low, and (4) a previous finding by Congress, relied upon in another case, that discrimination in the construction industry was prevalent across the nation. *Id.* at 500-04. The Court found that these facts failed to highlight identified discrimination in the Richmond construction industry, and were thus inadequate to justify the implementation of the Richmond plan. *Id.* at 505.

120. *Id.* at 507. The Court first noted that the city failed to assess any race-neutral alternatives to increasing minority participation in the construction industry. *Id.* In determining whether a race-based program is narrowly tailored, the Court will consider, as one factor, the availability of alternative non-race-based remedies. *Id.* (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)). The Court next found that Richmond's use of a 30%

mond plan violated the Equal Protection Clause due to the "treatment of its citizens on a racial basis."<sup>121</sup>

*b. Federal Government*

Although the Supreme Court settled the issue of the applicable standard of review for assessing Fourteenth Amendment challenges to benign racial classifications used by state and local governments, the same issue remained unresolved with respect to the Fifth Amendment's equal protection guarantee until one year after *Croson*.<sup>122</sup> The Court first addressed a Fifth Amendment affirmative action question in *Fullilove v. Klutznick*.<sup>123</sup> Much like the earlier decision in *Bakke*, *Fullilove* produced no majority opinion from the Court.<sup>124</sup>

In *Fullilove*, several associations of construction contractors challenged the Public Works Employment Act of 1977,<sup>125</sup> a federal program that provided additional funds for local public works projects.<sup>126</sup> The program conditioned the disbursement of funds on the local government's agreement to allocate at least ten percent of the grant to minority-owned businesses.<sup>127</sup> The contractors alleged that this provision violated the

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quota was too rigid and not sufficiently tailored to a proper determination of individualized need for remedial relief. *Id.* at 508.

121. *Id.* at 511 (opinion of O'Connor, J.). Justice O'Connor specifically noted, however, that the Court's holding should not prevent state or local governments from enacting programs to alleviate specific instances of racial discrimination, or sufficiently identifiable past discrimination that previously occurred in their jurisdictions. *Id.* at 509.

122. *See Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 552, 564-65 (1990) (determining that intermediate scrutiny should govern an equal protection claim of racial discrimination arising under the Fifth Amendment), *overruled in part by Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

123. 448 U.S. 448 (1980). Chief Justice Burger, joined by Justices White and Powell, filed an opinion announcing the judgment of the Court. *Id.* at 452. Justice Powell filed a concurring opinion. *Id.* Justice Marshall, joined by Justices Brennan and Blackmun, filed an opinion concurring in the judgment. *Id.* Justice Stewart filed a dissenting opinion joined by Justice Rehnquist. *Id.* Justice Stevens filed a dissent. *Id.*

124. *Id.* at 453; *see also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-72, 291 (1978) (opinion of Powell, J.) (producing no majority opinion from the Court, with Justice Powell announcing the judgment of the Court and arguing for strict scrutiny).

125. Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999 (1976) (codified at 42 U.S.C. § 6701 (1976)), *amended by* Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (1977) (current version at 42 U.S.C. §§ 6701-6736 (1994)).

126. *Fullilove*, 448 U.S. at 453 (opinion of Burger, C.J.).

127. *Id.* at 453-54. The applicable section provided:

Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at

equal protection guarantee of the Fifth Amendment.<sup>128</sup>

In reviewing the federal statute, Chief Justice Burger, joined by Justices White and Powell, first analyzed the legislative objectives of the minority business provision, emphasizing the importance of granting a high level of deference to congressional lawmakers.<sup>129</sup> He ultimately determined that the "clear objective" of the program was to ensure that participants did not perpetuate prior discrimination.<sup>130</sup> Chief Justice Burger next applied a two-part test to decide whether the statute was constitutional.<sup>131</sup> Although expressly refusing to label the analytical formula, he agreed that racial preferences imposed by the government must be subject to a "searching examination."<sup>132</sup> Ten years later,<sup>133</sup> in *Metro Broadcasting*,

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least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

42 U.S.C. § 6705(f)(2).

128. *Fullilove*; 448 U.S. at 455.

129. *Id.* at 456-72. Chief Justice Burger first analyzed the congressional hearings to determine the purposes of the provision. *Id.* at 457-63. He found that the original act was aimed at alleviating the national problem of unemployment and stimulating the national economy. *Id.* at 456-57. In 1977, Congress amended the original act, adding the minority business provision to steer federal funds to minority businesses that purportedly could not benefit from the original program. *Id.* at 458-59.

Because Congress is a co-equal branch, Chief Justice Burger articulated an intent to analyze the propriety of the program "with appropriate deference to the Congress." *Id.* at 472. The willingness to defer to Congress, even at an "appropriate" level, signalled the use of a standard less stringent than strict scrutiny. *See id.* at 473 (describing the use of a test resembling the intermediate standard of review).

130. *Id.* Thus, the ultimate purpose was remedial in nature. *Id.*

131. *Id.* The first step inquired whether Congress had the power to further the stated objectives. *Id.* The second step questioned whether the use of racial classifications was "a constitutionally permissible means for achieving the congressional objectives." *Id.*

Chief Justice Burger first found that the Act was a valid exercise of Congress's ability to "provide for the . . . general Welfare" under the Spending Power. *Id.* at 473-74 (quoting U.S. CONST. art. I, § 8, cl. 1). He next determined that the statute was neither underinclusive nor overinclusive, but was a proper exercise of Congress's broad remedial powers. *Id.* at 483-89. Thus, the statute passed the two-part test and did not violate the Constitution. *Id.* at 492.

132. *Id.* at 491. In analyzing the use of racial classifications as a means to achieve the stated objectives, Chief Justice Burger recognized the need for "careful judicial evaluation" despite the deference owed to Congress. *Id.* at 480. He did not, however, label the method of analysis: "[t]his opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated" in other cases. *Id.* at 492.

In an opinion concurring in the judgment, Justice Marshall used an intermediate scrutiny standard of review to determine the validity of the program at issue. *Id.* at 519. (Marshall, J., concurring in the judgment). Justice Marshall stated that "the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." *Id.*

*Inc. v. FCC*,<sup>134</sup> the Supreme Court faced another Fifth Amendment equal protection challenge.<sup>135</sup> In *Metro Broadcasting*, the Court reviewed two minority preference programs instituted by the Federal Communications Commission (FCC).<sup>136</sup> The first program permitted the FCC to consider an applicant's minority ownership when issuing new radio or television broadcast licenses.<sup>137</sup> The second program involved a "distress sale policy" whereby a licensee whose license was eligible for renewal or subject to revocation could assign it to a minority business without an agency hearing.<sup>138</sup>

Upon reviewing the two FCC programs, the Supreme Court again deferred to the legislative branch, applying intermediate rather than strict

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Because the use of a 10% minority set-aside provision was substantially related to the achievement of remedying present effects of prior discrimination, Justice Marshall found that the program survived judicial scrutiny. *Id.* at 521. He thus concurred in the judgment. *Id.* at 522.

133. During this ten year period, the Court faced two equal protection challenges to state affirmative action programs. See *supra* notes 104-21 and accompanying text (discussing the two intervening state affirmative action cases). Following its decision in *Fullilove*, however, the Court did not entertain another equal protection challenge to a federal affirmative action program until its decision in *Metro Broadcasting*. See *infra* notes 134-42 and accompanying text (reviewing *Metro Broadcasting*).

134. 497 U.S. 547 (1990), *overruled in part by* *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

135. *Id.* at 552.

136. *Id.*

137. *Id.* at 556 (citing Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978)). In comparing applications for broadcasting licenses under this policy, the FCC considered "minority ownership and participation in management" along with six other factors: "diversification of control of mass media communications, full-time participation in station operation by owners . . . , proposed program service, past broadcast record, efficient use of the frequency, and the character of the applicants." *Id.* at 556-57 (citing Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-99 (1965)).

138. *Id.* at 557 (citing Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 851 (1982)). The minority business had to meet the FCC's basic qualifications, with minority ownership exceeding 50%. *Id.* *Metro Broadcasting, Inc. (Metro)* along with several other applicants, including Rainbow Broadcasting (Rainbow), submitted an application to operate a television station in Orlando, Florida. *Id.* at 558. The FCC Review Board awarded the license to Rainbow largely because it was 90% Hispanic-owned. *Id.* at 558-59. Metro subsequently challenged the minority preferences under the Fifth Amendment's equal protection component. *Id.* at 552.

The Court consolidated this case with a decision involving Faith Center, Inc. (Faith Center), a minority licensee of a television station located in Hartford, Connecticut. *Id.* at 561. Faith Center, scheduled for a hearing on the renewal of its license, twice attempted to assign its license to another minority business under the "distress sale policy." *Id.* Meanwhile, a non-minority applicant, Shurberg, also applied for the FCC license. *Id.* When the FCC permitted Faith Center to assign the license to the minority business, Shurberg filed suit. *Id.* at 562.



scrutiny review.<sup>139</sup> Notwithstanding its recent holding in *Croson*, which called for strict scrutiny review of benign racial classifications created by state and local governments,<sup>140</sup> the Court justified its decision by distinguishing congressional action from state and local legislative action.<sup>141</sup> Relying on *Fullilove*, Justice Brennan emphasized the special ability of

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139. *Id.* at 563-65. The Court stated, "[W]e are 'bound to approach our task with appropriate deference to the Congress, a co-equal branch . . .'" *Id.* at 563 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (opinion of Burger, C.J.)). The Court emphasized the importance of "Congress' institutional competence as the National Legislature." *Id.*

The Court articulated the intermediate scrutiny analysis in *Craig v. Boren*, 429 U.S. 190, 197 (1976), a gender discrimination case. See *supra* note 14 and accompanying text (describing the intermediate standard of review). Laws surviving intermediate scrutiny "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197. In *Metro Broadcasting*, the Court expressly adopted the intermediate standard of review, stating that the FCC's policies must serve "important governmental objectives within the power of Congress and [must be] substantially related to achievement of those objectives." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 565 (1990), *overruled in part by Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

Unlike many of the prior affirmative action policies evaluated by the Court, the purpose of the FCC's minority preference programs was not explicitly remedial, attempting to alleviate the effects of prior discrimination. *Id.* at 556. Rather, the FCC wanted to increase diversity in the broadcast industry. *Id.* Compare *Metro Broadcasting*, 497 U.S. at 566 (describing Congress's selection of preference policies to promote programming diversity) with *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980) (opinion of Burger, C.J.) (discussing the remedial purpose of the minority business set-aside program). See also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (opinion of Powell, J.) (finding that promoting a diverse student body is a permissible goal of a minority preference program).

140. See *supra* notes 112-21 and accompanying text (discussing the *Croson* decision). The Court noted that *Croson* addressed a benign race-based program adopted by a municipal government, whereas Congress enacted the program at issue here. *Metro Broadcasting*, 497 U.S. at 565. Thus, the standard of review mandated in *Croson* did not govern the FCC programs because they were created by the federal government, not a state or local government. *Id.*

141. *Metro Broadcasting*, 497 U.S. at 565. Quoting *Croson*, the Court noted that "'Congress may identify and redress the effects of society-wide discrimination'" and "'need not make specific findings of discrimination to engage in race-conscious relief.'" *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 489-90 (1989) (opinion of O'Connor, J.)). Justice Scalia also found: "A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory." *Croson*, 488 U.S. at 522 (Scalia, J., concurring in the judgment).

Presumably, in *Metro Broadcasting*, Congress's enhanced ability to address general racial discrimination justified the Court's application of a less stringent standard of review in evaluating federal benign race-based legislation. *Metro Broadcasting*, 497 U.S. at 565-66. The Court ultimately sustained the FCC programs under the intermediate scrutiny test, holding that they did not violate the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at 600-01.

Congress to utilize racial classifications because of its "institutional competence" as a co-equal branch of government.<sup>142</sup>

The Court's use of varying standards to analyze equal protection claims of racial discrimination under the Fourteenth Amendment versus the Fifth Amendment raised serious questions and provoked critical commentary.<sup>143</sup> The *Adarand* Court revisited the issue of which standard of review should apply to benign racial classifications imposed by the federal government, holding strict scrutiny applicable across the board.<sup>144</sup>

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142. *Metro Broadcasting*, 497 U.S. at 563. Indeed, the *Fullilove* Court distinguished the program at issue based on its federal derivation, implying the need to afford Congress greater deference in its use of race-based classifications. *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (opinion of Burger, C.J.). Justice Powell reiterated this idea, emphasizing that Congress has unique constitutional powers in enforcing the Thirteenth, Fourteenth, and Fifteenth Amendments. *Id.* at 500 (Powell, J., concurring); see *supra* note 4 (discussing the Civil War Amendments). According to Justice Powell, "Congress properly may—and indeed must—address directly the problems of discrimination in our society." *Fullilove*, 448 U.S. at 499 (Powell, J., concurring). In *Metro Broadcasting*, Justice Brennan also relied on *Croson* to justify the notion that Congress should be afforded greater deference when it creates race-based remedies. *Metro Broadcasting*, 497 U.S. at 565-66; see *supra* note 141 (quoting various passages from *Croson* that discuss the federal-state distinction).

The *Adarand* decision largely discredits the federal-state distinction developed in *Fullilove* and *Metro Broadcasting* by asserting the importance of congruence between federal and state actions. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2123-26 (1995) (Stevens, J., dissenting) (criticizing the majority's refusal to grant Congress greater deference); see also *infra* notes 198-203 and accompanying text (discussing Justice Stevens' criticism of the *Adarand* majority's notion of congruence).

143. See, e.g., Neal Devins, Comment, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 129 (1990) (asserting that strict scrutiny is the appropriate standard of review for all governmental racial classifications); Charles Fried, Comment, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 113 (1990) (criticizing the Court's use of a relaxed standard of review in *Metro Broadcasting*); Katz, *supra* note 10, at 354-55 (advocating the use of intermediate scrutiny review of all benign classifications); Edward D. Rogers, *When Logic and Reality Collide: The Supreme Court and Minority Business Set-Asides*, 24 COLUM. J.L. & SOC. PROBS. 117, 166-68 (1990) (arguing that the *Croson* strict scrutiny standard should not apply to review of congressional affirmative action programs).

In arguing for strict scrutiny review of federal affirmative action programs, Professor Devins concedes that a federal decision to use racial classifications should receive more deference than a state or local government decision. Devins, *supra*, at 146. A lower standard of review, however, allows greater judicial tolerance of racial classifications than strict scrutiny. *Id.* at 147. Indeed, the *Metro Broadcasting* Court's standard tolerated a racial classification notwithstanding its infringement on individuals' equal protection rights: "The notion that first-amendment diversity concerns, in general, outweigh core equal protection concerns is dumbfounding." *Id.*

Other commentators argue that because of Congress's greater authority and duty to make national policies and findings, rather than specific regional findings, applying a lower standard of scrutiny alleviates separation of powers concerns. Rogers, *supra*, at 130-31. Thus, the greater the authority of the legislative body enacting the affirmative action program, the less stringent the Court's level of review. *Id.* at 132-33.

144. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995).

## II. *ADARAND CONSTRUCTORS, INC. v. PENÁ*: THE APPLICATION OF STRICT SCRUTINY TO ALL RACE-BASED AFFIRMATIVE ACTION PROGRAMS

In *Adarand Constructors, Inc. v. Pena*,<sup>145</sup> the Petitioner contested the federal government's ability to utilize monetary incentives to encourage prime contractors to award subcontracts to disadvantaged businesses.<sup>146</sup> Specifically, Adarand contended that the race-based presumptions used to determine whether a business is disadvantaged violated the right to equal protection under the Fifth Amendment.<sup>147</sup> The lower courts disagreed and upheld the program, after reviewing it under an intermediate standard of review.<sup>148</sup> The Supreme Court vacated and remanded the decision of the United States Court of Appeals for the Tenth Circuit, directing the lower court to apply strict scrutiny review.<sup>149</sup>

### A. *Equal Protection Jurisprudence: Skepticism, Consistency, and Congruence*

Evidenced by the number of differing opinions, the Court confronted a controversial and difficult issue in *Adarand*.<sup>150</sup> The majority based its ultimate decision on "three general propositions with respect to governmental racial classifications."<sup>151</sup> The Court began by tracing the history

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145. 115 S. Ct. 2097 (1995). Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, announced the judgment of the Court and authored an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV except insofar as the opinion was inconsistent with Justice Scalia's views. *Id.* at 2101. Justice Kennedy joined in Part III-C of Justice O'Connor's opinion. *Id.* Justice Scalia and Justice Thomas filed separate opinions concurring in part and in the judgment. *Id.* Justice Stevens, joined by Justice Ginsburg, filed a dissenting opinion. *Id.* Justice Souter filed a separate dissent, joined by Justices Ginsburg and Breyer. *Id.* Finally, Justice Ginsburg, joined by Justice Breyer, filed a dissent. *Id.*

146. *Id.*

147. *Id.*

148. See *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 244-45 (D. Colo. 1992) (granting the federal government's motion for summary judgment upon applying the *Fullilove* standard to uphold the constitutionality of the minority set-aside program at issue), *aff'd sub nom.* *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994), *vacated* 115 S. Ct. 2097 (1995); *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1547 (10th Cir. 1994) (affirming the district court's decision to grant the federal government's motion for summary judgment), *vacated* 115 S. Ct. 2097 (1995).

149. *Adarand*, 115 S. Ct. at 2118. According to an attorney associated with the case, the district court heard oral arguments during the summer of 1996.

150. The case resulted in a five to four decision. *Id.* at 2101; see *supra* note 145 (setting forth the various opinions in *Adarand*).

151. *Adarand*, 115 S. Ct. at 2111.

of equal protection law, highlighting a jurisprudential commitment to three propositions: skepticism, consistency, and congruence.<sup>152</sup>

### 1. Skepticism

The Court has been long adverse to the notion of racial classifications imposed by the government.<sup>153</sup> Indeed, in an early decision addressing federal racial classifications, the Court recognized that "racial discriminations are in most circumstances irrelevant and therefore prohibited."<sup>154</sup> One year later, the notion of viewing racial distinctions with skepticism again was articulated in *Korematsu v. United States*.<sup>155</sup> Justice Black's opinion, asserting that racial classifications are "immediately suspect" and, therefore, subject to "the most rigid scrutiny," has been relied upon by the Court in subsequent cases involving racial distinctions implemented by government actors.<sup>156</sup> The majority in *Adarand* acknowledged and affirmed these illustrations of the Court's historical skepticism towards racial classifications.<sup>157</sup>

### 2. Consistency

The *Adarand* majority defined consistency as the idea that *all* racial classifications imposed by the government demand the same standard of review, regardless of the motive underlying the classification.<sup>158</sup> Because it may be difficult to determine when a classification is benign, the Court

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152. *Id.* at 2106-12; *see also infra* notes 153-66 and accompanying text (discussing these three propositions).

153. *See Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (commenting that distinctions based on ancestry are contrary to equality, and therefore, governmental race-based classifications have been found to violate equal protection); *see also Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting outright that restrictions based on race should be immediately questioned).

154. *Hirabayashi*, 320 U.S. at 100.

155. *Korematsu*, 323 U.S. at 216.

156. *Id.*; *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (advocating the use of a heightened standard of review of governmental racial classifications). The *Bolling* Court reiterated that "classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Id.* (citing *Korematsu*, 323 U.S. at 216); *see also Loving v. Virginia*, 388 U.S. 1, 11 (1967) (finding that criminal statutes employing racial classifications are "especially suspect"); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (quoting *Bolling* for the proposition that racial classifications are "constitutionally suspect").

157. *Adarand*, 115 S. Ct. at 2111.

158. *Id.*; *see, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (opinion of O'Connor, J.); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1980) (opinion of Powell, J.); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.).

called for strict scrutiny review of all classifications.<sup>159</sup> The majority relied on language from Justice Powell's opinion in *Bakke*, which espoused the need for equity in enforcing equal protection of the laws.<sup>160</sup> Justice Powell asserted that, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."<sup>161</sup> Similarly, Justice O'Connor relied on the opinion in *Croson* to show that an individual's equal protection rights do not depend on race.<sup>162</sup>

### 3. Congruence

Finally, the *Adarand* majority advocated the necessity of analyzing equal protection claims under the Fifth Amendment in the same manner as those claims governed by the Fourteenth Amendment.<sup>163</sup> Throughout its analysis of the development of equal protection law, the majority highlighted the Court's continued commitment to identical review of these claims under the Fifth and the Fourteenth Amendments.<sup>164</sup> Justice O'Connor quoted *Buckley v. Valeo*<sup>165</sup> to illustrate the Court's under-

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159. *Adarand*, 115 S. Ct. at 2112-13. For this reason, strict scrutiny requires more than the mere recitation, by the government, of a proper motive for the use of a racial classification. See *Croson*, 488 U.S. at 500 (rejecting the city's designation of the set-aside plan as remedial). The Court in *Croson* emphasized that racial classifications are suspect. *Id.* Thus, "simple legislative assurances of good intention cannot suffice." *Id.*; see *infra* note 222 (discussing the difficulty in distinguishing between benign and malevolent motives).

160. *Adarand*, 115 S. Ct. at 2108; see *supra* notes 97-98 and accompanying text (discussing Justice Powell's assertion in *Bakke* that the Equal Protection Clause applies to all individuals, regardless of race).

161. *Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.). In *Bakke*, Justice Powell continued, "If both are not accorded the same protection, then it is not equal." *Id.* at 290. He also added, "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 291. Finally, he quoted language from an earlier race discrimination case: "The guarantees of equal protection . . . 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'" *Id.* at 292-93 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

162. *Adarand*, 115 S. Ct. at 2111. Justice O'Connor authored the opinion in *Croson*, finding that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Croson*, 488 U.S. at 494 (opinion of O'Connor, J.).

163. *Adarand*, 115 S. Ct. at 2111.

164. *Id.* at 2106-09. For example, the Court quoted a passage from *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964), a case involving a challenge to a Florida race-based law. *Id.* at 2107. The majority noted that the *McLaughlin* Court's reliance on case holdings involving federal statutes to support its decision in a case involving a state statute implied that the standards for state and federal racial classifications were the same. *Id.*

165. 424 U.S. 1 (1976) (per curiam).

standing that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."<sup>166</sup>

*B. Metro Broadcasting, Inc. v. FCC: Overruled*

In *Metro Broadcasting, Inc. v. FCC*,<sup>167</sup> the Court applied intermediate, rather than strict scrutiny, to the two race-based programs instituted by the FCC.<sup>168</sup> The Court justified its decision based on a duty to accord a high level of deference to Congress as the "National Legislature."<sup>169</sup> To support this concept, the Court reiterated the premise of *Fullilove v. Klutznick*, which acknowledged Congress's broad powers under Section Five of the Fourteenth Amendment<sup>170</sup> to enforce the Equal Protection Clause through the use of benign racial classifications.<sup>171</sup> Justice Brennan, writing for the majority, noted that although strict scrutiny review was warranted for state and local governmental affirmative action programs, it was not applicable here because the FCC was a federal agency.<sup>172</sup>

The *Adarand* majority criticized the Court's decision in *Metro Broadcasting* as disrupting the three propositions underlying prior equal protection jurisprudence.<sup>173</sup> First, the *Metro Broadcasting* decision upset the congruence existing between the equal protection standards applicable to Fifth and Fourteenth Amendment claims by imposing a less stringent standard of review on the federal government's use of benign racial classifications.<sup>174</sup> This, in turn, frustrated the importance of viewing racial classifications skeptically, by granting some governmental racial classifications greater leeway than others.<sup>175</sup> Finally, the holding in *Metro Broadcasting* undermined the principle of consistency by making the race

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166. *Adarand*, 115 S. Ct. at 2111 (quoting *Buckley*, 424 U.S. at 93).

167. 497 U.S. 547 (1990), *overruled in part by* *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

168. *Id.* at 564-65; *see supra* notes 134-42 and accompanying text for a more detailed discussion of *Metro Broadcasting*.

169. *Metro Broadcasting*, 497 U.S. at 563.

170. U.S. CONST. amend XIV, § 5; *see supra* note 1 (providing the text of Section Five of the Fourteenth Amendment).

171. *Metro Broadcasting*, 497 U.S. at 564-65.

172. *Id.* at 565. Justice Brennan found that much of the justification for imposing strict scrutiny review of state and local affirmative action programs in *Croson* relied on a distinction between the lesser ability of state and local governments to address racial discrimination versus Congress's heightened ability to do so. *Id.* at 565-66.

173. *Adarand*, 115 S. Ct. at 2112; *see supra* notes 153-66 and accompanying text (discussing in detail the three propositions: skepticism, consistency, and congruence).

174. *Adarand*, 115 S. Ct. at 2111-12.

175. *Id.* at 2112. Some racial classifications imposed by the government were no longer "inherently suspect," as previously espoused by the Court. *See Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting) (arguing that according to the Constitution, all

of the group benefitting from the classification determinative of the applicable standard of review.<sup>176</sup> To ensure the continued adherence to the three propositions underlying equal protection jurisprudence, the *Adarand* majority ordered strict scrutiny review of all racial classifications, overruling *Metro Broadcasting* to the extent that it called for intermediate scrutiny review of benign federal governmental race-based classifications.<sup>177</sup>

### C. *Stare Decisis*

Because the *Adarand* Court rejected two of its earlier rulings,<sup>178</sup> Justice O'Connor, joined only by Justice Kennedy, justified the departure from precedent and the doctrine of *stare decisis*.<sup>179</sup> She noted that the Court may reject a prior ruling when that ruling undermines a doctrine embedded in prior law.<sup>180</sup> In support, Justice O'Connor cited several analogous cases in which the Supreme Court justifiably had overruled previous decisions.<sup>181</sup> Because *Metro Broadcasting* itself was a recent departure from "the fabric of the law," reliance on its holding presumably

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government actions that treat individuals differently because of race or ethnicity are suspect).

176. *Adarand*, 115 S. Ct. at 2112.

177. *Id.* at 2113. The majority asserted that the use of strict scrutiny is "essential" to ensuring that a benign racial classification is indeed "benign" and not an illegitimate use of race. *Id.* at 2112 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.)). A lesser standard of scrutiny does not protect against this danger. *Id.*

178. *Id.* at 2113, 2117. The Court explicitly overruled its holding in *Metro Broadcasting*, which subjected federal affirmative action programs to a standard less than strict scrutiny. *Id.* at 2113. Further, *Adarand* clarified that "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling." *Id.* at 2117.

179. *Id.* at 2114-17 (opinion of O'Connor, J.). Black's Law Dictionary defines *stare decisis* as "[t]o abide by, or adhere to, decided cases." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990); see also Devins, *supra* note 143, at 156 (questioning the precedential value of *Metro Broadcasting*).

180. *Adarand*, 115 S. Ct. at 2114-15. Justice O'Connor heeded Justice Frankfurter's warning in an earlier case that "'stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.'" *Id.* (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). *Metro Broadcasting* created a distinction between standards of review of federal and state racial classifications that undermined the doctrine of equal protection, including the three principles of skepticism, consistency, and congruence, established over the past five decades. *Id.* at 2115.

181. *Id.* at 2115-16. For example, the Court's decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) overruled the holding of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) because *Arnold* was an "abrupt and largely unexplained departure" from precedent. *Adarand*, 115 S. Ct. at 2115 (quoting *Continental T.V.*, 433 U.S. at 47-48).

was minimal, having little impact on primary conduct.<sup>182</sup> Thus, the *Adarand* decision did not depart from prior law, it restored it.<sup>183</sup>

#### D. The Concurrences

Justice Scalia issued a brief concurrence expressing his view that remedying the effects of past discrimination can *never* be a compelling government interest.<sup>184</sup> He cited various constitutional provisions aimed at rejecting racial distinctions.<sup>185</sup> Finally, he contended that the affirmative action program at issue would not survive strict scrutiny review on remand.<sup>186</sup>

Justice Thomas filed a separate concurrence, indicating his agreement with the majority's decision to demand strict scrutiny review of all governmental classifications based on race.<sup>187</sup> He also expressed his impassioned views on the danger of awarding preferential treatment to certain classes of people based on race; this, he argued, results in "racial paternalism."<sup>188</sup> Justice Thomas concluded that governmental discrimination is unacceptable for *any* reason.<sup>189</sup>

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182. *Id.* at 2116. To illustrate, Justice O'Connor cited a recent case in which the Court refused to overrule its holding in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), because "private parties ha[d] likely written contracts relying upon *Southland* as authority." *Id.* (citing *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 838-39 (1995)).

183. *Id.*

184. *Id.* at 2118 (Scalia, J., concurring in part and in the judgment). Justice Scalia argued that "under our Constitution there can be no such thing as either a creditor or a debtor race." *Id.* Justice Scalia did not join in part III-C of the decision, in which Justice O'Connor provided the rationale for failing to adhere to the doctrine of *stare decisis*. *Id.*

185. *Id.* at 2118-19. Justice Scalia quoted the Fourteenth Amendment, the Fifteenth Amendment, Article III, § 3, and Article 1, § 9 to illustrate the Constitution's rejection of racial classifications. *Id.*; see U.S. CONST. art. III, § 3 (providing that "no Attainder of Treason shall work Corruption of Blood"); U.S. CONST. art. I, § 9 ("No Title of Nobility shall be granted by the United States"). According to Justice Scalia, "In the eyes of government, we are just one race here. It is American." *Adarand*, 115 S. Ct. at 2119.

186. *Adarand*, 115 S. Ct. at 2119.

187. *Id.* (Thomas, J., concurring in part and in the judgment). Justice Thomas wrote separately to express his disagreement with the "racial paternalism exception to the principle of equal protection" espoused in Justice Stevens's and Justice Ginsburg's dissents. *Id.*

188. *Id.* Justice Thomas warned that so-called benign racial preferences erode the self-worth of minorities and provoke resentment among the majority. *Id.* Additionally, government affirmative action programs may cause minorities to become dependent on assistance or feel "entitled" to preferences. *Id.* These views are commonly asserted by those opposing affirmative action programs. See *supra* note 22 (describing the harmful effects of affirmative action programs, such as the stigma imposed on recipients of affirmative action preferences).

189. *Adarand*, 115 S. Ct. at 2119.



*E. The Dissents*

In a lengthy dissenting opinion joined by Justice Ginsburg, Justice Stevens vehemently criticized the majority's interpretation of equal protection values.<sup>190</sup> He first commented on the Court's notion of skepticism, agreeing that courts "should be wary" of racial classifications implemented by the government.<sup>191</sup> He then attacked the notions of consistency and congruence, arguing that the majority ignored well-settled law governing affirmative action.<sup>192</sup>

According to Justice Stevens, a significant difference exists between the government's decision to burden the minority, and its decision to benefit the minority while incidentally burdening the majority.<sup>193</sup> The former results in oppression, while the latter fosters equality in society.<sup>194</sup> Justice Stevens also challenged the majority's assertion that it is difficult to distinguish between benign and invidious classifications.<sup>195</sup> Because affirmative action is "common and well understood," he argued that it is easy to distinguish good intentions from bad.<sup>196</sup> For this reason, affirmative action laws that impose incidental burdens on the majority while providing benefits to the disadvantaged minority need not be subject to the same strict standard of review.<sup>197</sup>

Similarly, Justice Stevens criticized the majority's notion of congruence as rejecting the "practical and legal differences" between federal and state government actions.<sup>198</sup> He noted that the opinions in *Metro Broad-*

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190. *Id.* at 2120 (Stevens, J., dissenting).

191. *Id.*

192. *Id.* at 2126. Justice Stevens rejected Justice O'Connor's explanation justifying a departure from the concept of stare decisis. *Id.* at 2127. He noted that only Justice Kennedy joined in this explanation, while the other members of the majority provided no explanation for their decision to overrule precedent in this area. *Id.* at 2127 n.12; see *supra* notes 179-83 and accompanying text (discussing the majority's justification for its departure from precedent).

193. *Adarand*, 115 S. Ct. at 2120. In other words, benign racial classifications imposed by the government should be treated differently than invidious racial classifications because the underlying motive of each is distinct. *Id.*

194. *Id.*

195. *Id.* at 2121-22.

196. *Id.* at 2121.

197. *Id.* at 2122-23. Justice Stevens acknowledged that applying the same standard to "fundamentally different situations" is justified where that single standard can account for the differences. *Id.* at 2122. He limited his acquiescence to the majority's decision, however, noting that "a single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of 'equal protection.'" *Id.*

198. *Id.* at 2123. According to Justice Stevens, rooted in precedent in this instance is the notion that Congress is entitled to far greater deference in enacting affirmative action programs because of its "institutional competence and constitutional authority." *Id.* at 2125.

casting and *Fullilove*, as well as the opinions in *Croson* authored by Justice Scalia and Justice O'Connor, relied upon this distinction.<sup>199</sup> Additionally, federal affirmative action programs should receive greater deference because federal programs represent the "will of our entire Nation's elected representatives," whereas state and local programs may impose burdens on those non-residents powerless to participate in the decision to enact the program.<sup>200</sup> Congress's enforcement powers, enumerated in Section Five of the Fourteenth Amendment, entitle it to "far greater deference" when enacting affirmative action programs.<sup>201</sup> Justice Stevens, therefore, concluded that the majority's notion of congruence conflicted with well-established principles of equal protection precedent.<sup>202</sup> Finally, he found the minority set-aside program at issue valid, arguing that it was a "carefully crafted program" that passed judicial scrutiny.<sup>203</sup>

Justice Souter also dissented, joined by Justices Breyer and Ginsburg, indicating his hesitancy to address the standard of review question due to

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199. *Id.* at 2124-25. In *Croson*, Justice Scalia explained that a "sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522 (1989) (Scalia, J., concurring in the judgment). Justice O'Connor similarly asserted that, "The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race." *Id.* at 490 (opinion of O'Connor, J.).

200. *Adarand*, 115 S. Ct. at 2125 (Stevens, J., dissenting). This problem arises at the local level because individuals who are ineligible to vote for legislators who enact affirmative action programs nevertheless may be affected by the programs. *Id.*

201. *Id.* at 2126; *see supra* notes 141-42 (discussing the *Metro Broadcasting* Court's reliance on the greater deference owed Congress to justify the use of intermediate scrutiny).

202. *Adarand*, 115 S. Ct. at 2126-27 (Stevens, J., dissenting). Justice Stevens noted that *Metro Broadcasting* and *Fullilove* both justified the application of a lower standard of review to federal remedial programs based on the greater level of deference accorded Congress. *Id.* Additionally, in *Croson*, the Court justified its imposition of a stricter standard of review on state and local governments using the "federal-state" distinction. *Id.* at 2127. According to Justice Stevens, the *Adarand* majority erroneously ignored this firm dichotomy in order to promote the notion of congruence. *Id.*

203. *Id.* at 2128-30. Justice Stevens compared the STURAA preference program to the program upheld in *Fullilove*, finding the current program no more "objectionable." *Id.* at 2128. He noted that the current program, unlike the one involved in *Fullilove*, did not make race the sole criterion for the benefits, but established a rebuttable presumption of disadvantage based on race. *Id.* at 2128-29. Also, the STURAA program provided for periodic review of those receiving the benefits, preventing illegitimate firms from taking advantage of the program. *Id.* at 2129-30. Whereas the *Fullilove* program required that ten percent of the federal grant go to minorities, the STURAA scheme set no specific requirements, just goals. *Id.* at 2130. Finally, Justice Stevens asserted that the extensive congressional deliberations regarding the minority set-aside program demand that the Court grant Congress even greater deference than in *Fullilove*, presumably because the STURAA program was enacted only after careful consideration. *Id.*

stare decisis considerations.<sup>204</sup> He emphasized the majority's failure to address the issue of the high level of deference due Congress under Section Five of the Fourteenth Amendment.<sup>205</sup> Finally, he found the temporary burden imposed on the "historically favored race" reasonable to eliminate continued discriminatory effects.<sup>206</sup>

In the final dissent, Justice Ginsburg, joined by Justice Breyer, focused on the necessity of affirmative action programs to remedy the continuing effects of discrimination.<sup>207</sup> Justice Ginsburg expressed concern that the strict scrutiny standard may indeed be "fatal" for affirmative action programs,<sup>208</sup> but nevertheless defended the need for "close review" of such programs without specifically labeling this level of review.<sup>209</sup>

### III. IN SEARCH OF EQUALITY

#### A. *Three Racial Classification Propositions: Are They Valid?*

##### 1. *Skepticism*

The majority's espousal of three propositions underlying governmental racial classifications derives logically and soundly from the body of equal protection law developed over the years.<sup>210</sup> The first proposition, that

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204. *Id.* at 2131-32 (Souter, J., dissenting). Justice Souter agreed with Justice Stevens that stare decisis required the Court to apply the *Fullilove* standard in this case. *Id.* at 2132. He further argued that the set-aside program was constitutional under the *Fullilove* test. *Id.* at 2131.

205. *Id.* at 2133. The majority opinion briefly defended its decision to apply strict scrutiny by asserting that its decision did not "contravene any principle of appropriate respect for a co-equal Branch of the Government." *Adarand*, 115 S. Ct. at 2114. It acknowledged the varying views advocated by certain members of the majority in other cases, yet tersely dismissed these differences: "We need not, and do not, address these differences today." *Id.*

206. *Id.* at 2133-34 (Souter, J., dissenting).

207. *Id.* at 2134-36 (Ginsburg, J., dissenting). Justice Ginsburg cited various social science studies illustrating the persistent inconsistencies individuals encounter in employment, business, and marketplace opportunities because of their race. *Id.* at 2135 nn.3-5. For example, studies suggest that job seekers with identical qualifications receive disparate treatment depending on their race. *Id.* at 2135 n.3 (citing Harry Cross et al., *Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers*, URB. INST. REP. 90-4 42 (1990)); see *supra* notes 7-9 and accompanying text (providing similar statistics).

208. *Adarand*, 115 S. Ct. at 2136 (Ginsburg, J., dissenting).

209. *Id.* While Justice Ginsburg advocated "close review" to "ferret out classifications in reality malign, but masquerading as benign" and to ensure that "preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups," she disagreed with the majority's use of the term "strict scrutiny." *Id.*

210. See *supra* notes 48-144 and accompanying text (discussing in detail the historical development of equal protection jurisprudence in the realm of governmental race discrimination).

courts must view governmentally imposed racial classifications with skepticism, invites little controversy.<sup>211</sup> Since the first decisions addressing the government's use of restrictions based on race, the Court has indicated the need to view such restrictions with suspicion.<sup>212</sup> Because strict scrutiny is the most exacting standard of review, it follows that the application of strict scrutiny to all racial classifications imposed by the government upholds the Court's commitment to viewing governmental racial classifications with skepticism.<sup>213</sup>

## 2. Consistency

As in previous challenges to racially discriminatory laws, "consistency" compels courts to question the motives underlying any governmental program employing racial classifications, including affirmative action programs.<sup>214</sup> The government's use of race as a classifying factor has been criticized since the adoption of the Equal Protection Clause.<sup>215</sup> Until the early 1970s, the Supreme Court faced challenges solely to invidious governmental uses of race.<sup>216</sup> Affirmative action, however, by definition seeks to utilize racial criteria to benefit the minority class.<sup>217</sup> Thus, the

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211. Indeed, in his dissent, Justice Stevens agreed that the Court's idea of skepticism is "a good statement of law and of common sense." *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting).

212. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that racial classifications are "immediately suspect"); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (declaring that distinctions based on ancestry are "odious to a free people").

213. See *Adarand*, 115 S. Ct. at 2113 (espousing the need for strict scrutiny review to distinguish the government's legitimate use of race as a classifying factor from an illegitimate one).

214. Because affirmative action programs classify by race in a "benign" manner, such programs arguably do not require strict judicial review. See *id.* at 2120-23 (Stevens, J., dissenting) (arguing that significant differences in the type of classification justify different standards of review). The majority, however, refused to accept that the applicable standard of review should depend on the race of the individual benefited or burdened by a governmental classification. *Id.* at 2111.

215. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.) (noting that the purpose of the Fourteenth Amendment was to protect the former slaves from oppression); *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 306 (1879) (asserting that the framing and adoption of the Fourteenth Amendment resulted from a desire to "assure to the colored race the enjoyment of all the civil rights"); see also *supra* notes 3-5 (discussing the adoption of the Fourteenth Amendment).

216. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (involving a statute expressly prohibiting interracial marriages); *Strauder*, 100 U.S. at 305 (involving a statute that allowed only white males to serve on juries). Some statutes, while not expressly utilizing race as a classification, discriminated against certain races in their effect. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (determining that a statute preventing the use of certain types of buildings as laundries discriminated against the Chinese population); see also *supra* note 86 (describing statutes invalidated by the Court due to discriminatory effects).

217. See *supra* note 10 (defining affirmative action programs).

government's creation of affirmative action programs presented the courts with a novel utilization of race as a benign classifying factor.<sup>218</sup>

Consistency directs courts to review all racial classifications using the same standard, regardless of whether the classification burdens the minority or the majority.<sup>219</sup> To some, consistency ignores the government's "good" motives and intentions that underlie the use of racial classifications.<sup>220</sup> Justice Stevens argued that the government's use of benign classifications should be held to a less stringent standard because this type of

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218. The advent of affirmative action programs gave rise to claims of "reverse discrimination," in which white males claimed they were denied equal opportunities by virtue of the government's grant of preferential treatment to minorities based on race, gender, or ethnicity. See *supra* note 95 (discussing reverse discrimination). For this reason, the Supreme Court has had considerable difficulty determining the constitutional limits of these programs, evidenced by its inability, until *Adarand*, to determine what judicial standard of review should be used in analyzing affirmative action programs. Compare *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (employing an intermediate scrutiny standard to federal minority preference programs), *overruled in part* by *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) with *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) (demanding strict scrutiny review of state and local governmental affirmative action programs) and *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980) (opinion of Burger, C.J.) (adopting a two-part test to analyze a federal minority set-aside program).

219. *Adarand*, 115 S. Ct. at 2111. Because consistency calls for treating people of all races the same, the ever-changing demographics of the United States make this idea increasingly more valid. Those groups once considered minorities are now becoming majorities in certain parts of the country. See Diane Seo, *Growing Asian Enrollment Redefines UC Campuses*, L.A. TIMES, Dec. 27, 1995, at A1, A10. For instance, the Asian population in California increased by 1.5 million between 1980 and 1990. *Id.* at A10. Asians are considered minorities in California, yet they comprise the largest ethnic group at four University of California campuses: Berkeley, Los Angeles, Irvine and Riverside. *Id.* Due to their increasing numbers, many Asians complain that they are denied admission to the most elite University of California schools, UCLA and Berkeley, while blacks, Latinos, and Native Americans with lower qualifications are admitted under affirmative action programs. *Id.* Thus, the minority/majority categories have become blurred in the University of California school system, causing the Asian "minority" population in California's undergraduate system to suffer in the same way that the white "majority" suffers from affirmative action.

220. Motives and intentions are distinct concepts. Strasser, *supra* note 16, at 341. Motivation provokes an individual to act in a certain manner. *Id.* Intentions, on the other hand, are the goals behind the action. *Id.* Although theoretically distinct, the Supreme Court has blurred the two concepts in its affirmative action jurisprudence. *Id.* at 342. Prior to affirmative action, invidious discrimination largely meant intentional discrimination, regardless of a malevolent motive. *Id.* Affirmative action, however, involves intentional classification for benign purposes. See *supra* note 10 (defining affirmative action programs). Thus, the Court must decipher the motive behind intentional classifications employed in affirmative action programs. See Strasser, *supra* note 16, at 343 (arguing that the current Court refuses to find that benevolence is a proper motive for any statute that includes an intentional race-based classification).

classification seeks to "foster equality."<sup>221</sup> In other words, because a proper motive underlies the intentional classification, the Court should more readily find the classification valid.<sup>222</sup>

The inherent dilemma is that racial classifications of any kind impose a burden on one class, while providing a benefit to another.<sup>223</sup> The dissenting Justices argued that the burden imposed on the majority by affirmative action-type racial classifications is merely incidental and temporary.<sup>224</sup> The Equal Protection Clause, however, stands for the proposi-

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221. *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting). Unfortunately, benign preferences, even when truly "benign," may actually harm the recipients of the preferences. *Id.* at 2119 (Thomas, J., concurring in part and in the judgment). Justice Thomas expressed his vehement opposition to benign racial preferences because they "stamp minorities with a badge of inferiority" and indicate that the recipients of the preferences cannot compete on their own due to some immutable characteristic linked to their race. *Id.* In *Croson*, Justice O'Connor expressed a similar view: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.). Those opposing affirmative action programs often rely on this argument. See, e.g., Braswell et al., *supra* note 6, at 411-13 (describing the social costs of affirmative action programs, including the stigma attached to those receiving racial preferences, and the hostility that affirmative action provokes in those not receiving racial preferences).

222. *Adarand*, 115 S. Ct. at 2121 (Stevens, J., dissenting). Justice Stevens argued that the difference in motive is significant. *Id.* He asserted that consistency "would disregard the difference between a 'No Trespassing' sign and a welcome mat." *Id.* He also emphasized the ease with which "people understand the difference between good intentions and bad." *Id.*

Over the years, however, the Court has indicated three major concerns regarding its ability to distinguish between "benign" and "invidious" classifications. Strasser, *supra* note 16, at 344. First, the Court questions its ability to recognize improper motives. *Id.* Second, the Court distrusts outright claims of benign purpose. *Id.* Finally, the Court fears the negative effects that may result from a purportedly benign classification. *Id.* Similarly, the *Adarand* majority expressed the concern that "it may not always be clear that a so-called preference is in fact benign." *Adarand*, 115 S. Ct. at 2112 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.)).

The difficulty of distinguishing between the two types of racial classifications makes the application of two different standards extremely risky. Justice Stevens's dual-standard approach would render the courts susceptible to applying intermediate scrutiny to a preferential program that was benign in theory, but invidious in fact, thereby enabling the courts to participate in the perpetuation of the governmental racial discrimination sought to be eradicated. See Devins, *supra* note 143, at 146-47 (discussing the dangers of intermediate scrutiny review).

223. See *Adarand*, 115 S. Ct. at 2114 ("Consistency does recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."). Justice Thomas added, "It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Id.* at 2119 n.\* (Thomas, J., concurring in part and in the judgment).

224. See, e.g., *id.* at 2133-34 (Souter, J., dissenting) (arguing that the incidental cost imposed on the majority by affirmative action programs is reasonable because "it is a price to be paid only temporarily").

tion that laws must be equal in application.<sup>225</sup> Equal protection mandates that race-based laws resulting in oppression of the minority must be adjudged on the same basis as similar laws that burden the majority, even if only incidentally.<sup>226</sup> Thus, the majority properly concluded that because invidious racial classifications demand strict scrutiny review, so too must all benign racial classifications used by the government be subject to strict scrutiny.<sup>227</sup>

### 3. Congruence

The notion of congruence as a justification for mandating strict scrutiny across the board contradicts, to some extent, the reasoning articulated in recent Supreme Court decisions addressing affirmative action programs.<sup>228</sup> In reviewing the historical development of equal protection jurisprudence, the majority concluded that equal protection analysis under the Fifth Amendment is the same as under the Fourteenth Amend-

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225. U.S. CONST. amend. XIV, § 1; *see supra* note 1 (quoting the text of Section One of the Fourteenth Amendment).

226. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.). In *Bakke*, Justice Powell articulated the true meaning of equal protection in the affirmative action context: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.*

227. *Adarand*, 115 S. Ct. at 2113. Strict scrutiny review also alleviates the difficulty courts may have in distinguishing between benign and invidious classifications. *Id.* at 2112. Justice O'Connor, in her opinion in *Croson*, explained the necessity of utilizing strict scrutiny for this reason:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.).

228. Recent decisions have created a federal-state dichotomy to justify applying different standards of review when governments attempt to remedy prior racial discrimination. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (maintaining that Congress's broad power to enforce the Fourteenth Amendment justifies the utilization of a less stringent standard of scrutiny to review benign federal preference programs), *overruled in part by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Croson*, 488 U.S. at 490-92 (opinion of O'Connor, J.) (justifying the application of strict scrutiny review of state affirmative action programs by positing the notion that states are not as able as Congress to determine the necessity of such programs); *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (opinion of Burger, C.J.) (granting an "appropriate" level of deference to Congress in scrutinizing a federal affirmative action program); *see also supra* notes 141-42 and accompanying text (discussing the federal-state distinction and the standard of review applicable to affirmative action programs).

ment.<sup>229</sup> In recent decisions addressing the government's imposition of racial classifications for benign purposes, however, several Justices have advocated granting Congress greater deference than state or local governments when reviewing affirmative action programs.<sup>230</sup> Nonetheless, these Justices apparently did not intend for this increased deference to result in the application of a lower level of scrutiny to racial classifications imposed by the federal government.<sup>231</sup> Requiring Congress's programs to undergo strict scrutiny review by the courts "does not contravene any principle of appropriate respect for a co-equal Branch of the Government."<sup>232</sup>

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229. *Adarand*, 115 S. Ct. at 2111; see *supra* notes 163-66 and accompanying text (discussing the judicial tradition of treating state and federal equal protection claims in the same manner).

230. See, e.g., *Croson*, 488 U.S. at 521-25 (Scalia, J., concurring in the judgment); *Id.* at 490 (opinion of O'Connor, J.).

231. See *Adarand*, 115 S. Ct. at 2114 (discussing the appropriate level of deference that should be granted to Congress in its enactment of affirmative action programs—the same as that owed to the states). Judge Fried has argued that while Congress may be entitled to greater deference due to its constitutional authority to enforce the Fourteenth Amendment, this greater deference should not determine the applicable standard of review. Fried, *supra* note 143, at 114-15. Furthermore, he noted that more deference should be granted to Congress in its discrimination fact-finding abilities, and its power to undertake the appropriate remedy. *Id.* at 114. This deference, however, "in no way alters the substantive standards that determine what does or does not violate the Constitution." *Id.* Judge Fried agreed with *Adarand's* notion of congruence: "Nothing in *Fullilove* or in common sense suggests that equal protection can mean one thing for the Congress and another thing for every other level and organ of government." *Id.* at 117.

Indeed, the dual-standard approach posed a variety of problems for the courts in determining how to correctly apply strict and intermediate scrutiny. Rogers, *supra* note 143, at 118. In addition, certain programs may not easily be labeled federal, state, or local, causing confusion as to the applicable standard of review. *Id.* at 119.

232. *Adarand*, 115 S. Ct. at 2114. In dissent, Justice Stevens contended that the federal government has greater "institutional competence" than the states to redress past race discrimination, and thus Congress should be afforded greater deference. *Id.* at 2125 (Stevens, J., dissenting). While Justice Stevens was correct in recognizing the Court's recent expositions distinguishing federal and state abilities to remedy past discrimination, he failed to recognize that these distinctions were drawn within the past fifteen years since the *Fullilove* decision. See *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980) (opinion of Burger, C.J.) (asserting the importance of according Congress the appropriate level of deference in its power to uphold equal protection of the laws). The historical development of equal protection law prior to *Fullilove*, as described by the majority, stands for the proposition that the federal government owes the same duty as the state and local governments in upholding the equal protection guarantee. See *supra* notes 163-66 and accompanying text (highlighting the Court's historical commitment to this proposition).



*B. Confidence or Confusion? How Should Courts Apply  
Strict Scrutiny?*

In *Adarand*, the Supreme Court ultimately directed lower courts to apply the strict scrutiny standard of review to all governmental racial classifications allegedly violative of equal protection rights.<sup>233</sup> The Court remanded the case for further review under this standard.<sup>234</sup> The conclusion drawn by the majority, however, is not a "death knell" for federal affirmative action programs.<sup>235</sup> Rather, strict scrutiny review ensures that the federal government, like state and local governments, will use racial classifications only when they are narrowly tailored to furthering a compelling governmental interest.<sup>236</sup>

By not applying strict scrutiny to the *Adarand* program, however, the Court failed to provide adequate guidance to the lower courts in their

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233. *Adarand*, 115 S. Ct. at 2113.

234. *Id.* at 2118.

235. *See id.* at 2117. It has been hypothesized that strict scrutiny analysis is "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Indeed, in her dissent in *Adarand*, Justice Ginsburg expressed a fear of this result. *Adarand*, 115 S. Ct. at 2136 (Ginsburg, J., dissenting); *see supra* notes 207-09 and accompanying text (discussing the dissent authored by Justice Ginsburg).

It is possible for affirmative action programs to survive strict scrutiny. *See* Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1562 (11th Cir. 1994) (upholding a county's race-based hiring program for firefighters under strict scrutiny); *see also* Strasser, *supra* note 16, at 346 (arguing that the use of strict scrutiny does not demand that all race-based statutes be invalidated). *But see* Long v. City of Saginaw, 911 F.2d 1192, 1203 (6th Cir. 1990) (invalidating a city's race-based hiring program for police officers under strict scrutiny). Indeed, many affirmative action programs still exist at the state and local level, even after *Croson* mandated strict scrutiny review of these programs. Memorandum from Walter Dellinger, Assistant Attorney General, to General Counsels Re: *Adarand* 28 (June 28, 1995) [hereinafter Memo].

236. *Adarand* 115 S. Ct. at 2117. Justice O'Connor further stated, "We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means." *Id.*

The majority, except Justice Scalia, expressly conceded that governments have the capacity to remedy the effects of past racial discrimination through affirmative action programs as long as those programs are necessary to further a compelling interest and are narrowly tailored. *Id.* at 2117. *But see id.* at 2118 (Scalia, J., concurring) (asserting that the government can never have a compelling interest in discriminating to remedy prior discrimination). For example, Justice O'Connor discussed the Court's decision in *United States v. Paradise*, 480 U.S. 149 (1987), as indicative of the continued ability of the government to institute affirmative action programs. *Id.* at 2117. In that case, the Court found that the United States District Court for the Middle District of Alabama had the authority to impose a one-black-one-white promotion scheme on the Alabama Department of Public Safety because the scheme was narrowly tailored to remedying the Department's "pervasive, systematic, and obstinate discriminatory conduct." *Paradise*, 480 U.S. at 167.

future application of strict scrutiny to affirmative action programs.<sup>237</sup> The Court provided only minimal instruction to the lower court, directing it to determine whether the government has a compelling interest in utilizing minority-based financial incentives in subcontracts, and whether the program was narrowly tailored to further that interest.<sup>238</sup> The Court

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237. Memo, *supra* note 235, at 9. Because the Court did not determine the constitutionality of the program in *Adarand*, future judicial analysis of affirmative action programs must be based on *Croson* and subsequent lower court decisions applying strict scrutiny to state and local governmental affirmative action programs. *Id.* at 2. Although strict scrutiny now applies to both federal and state affirmative action programs, some commentators suggest that courts may defer to Congress more readily in applying strict scrutiny to federal remedial affirmative action programs. *See id.* at 9 (speculating that, "even under strict scrutiny, programs statutorily prescribed by Congress may be entitled to greater deference than programs adopted by state and local governments."). Hence, the strict scrutiny standards developed in *Croson* may not apply as strictly to the federal government. *Id.*

238. *Adarand*, 115 S. Ct. at 2118. These directions are merely an elaboration of the strict scrutiny standard. Because *Croson* sets the standards for strict scrutiny review of state and local governmental classifications, courts must look to its guidelines to determine whether a federal affirmative action program is narrowly tailored and furthers a compelling government interest. Memo, *supra* note 235, at 8-9.

The ends most frequently served by affirmative action programs are remedial, alleviating the effects of prior discrimination. *See, e.g., Adarand*, 115 S. Ct. at 2102 (remedying the effects of past discrimination in the construction industry); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (opinion of O'Connor, J.) (same); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (opinion of Powell, J.) (remedying the effects of prior discrimination in the employment of teachers); *Fullilove v. Klutznick*, 448 U.S. 448, 481 (1980) (remedying the effects of prior discrimination in the construction industry).

*Croson* requires the government to provide a "strong basis in evidence" of the need for these types of affirmative action programs. Memo, *supra* note 235, at 11 (quoting *Croson*, 488 U.S. at 500). This includes probative statistical evidence of discrimination in the particular industry or region. *Id.* at 12. Other plausible proof, although insufficient on its own, may include anecdotal evidence, such as complaints or testimony. *See Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1002-03 (3d Cir. 1993) (evaluating anecdotal evidence in addition to other evidence of prior discrimination). Finally, while not specifically addressed in *Croson*, it appears that the government may present evidence not relied upon previously in the enactment of the program. Memo, *supra* note 235, at 13-14; *see, e.g., Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994); *Contractors Ass'n*, 6 F.3d at 1004; *Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

Whether non-remedial objectives, such as the achievement of diversity in a particular setting, survive strict scrutiny is uncertain after both *Croson* and *Adarand*. Memo, *supra* note 235, at 14-19. Both *Bakke* and *Metro Broadcasting* involved attempts to achieve diversity through affirmative action programs, the former in an institution of higher education, the latter in the broadcast industry. *See supra* notes 94-103 and 134-42 (discussing the *Bakke* and *Metro Broadcasting* opinions respectively). Justice Stevens argued that the majority in *Adarand* did not overrule the validity of diversity as a legitimate government goal. *Adarand*, 115 S. Ct. at 2127 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case").

Recently, the United States Court of Appeals for the Fifth Circuit invalidated an affirmative action program at the University of Texas School of Law because the program im-

further suggested that the lower court determine whether there was an alternative race-neutral means to achieve the governmental objective.<sup>239</sup> Finally, the Court directed the lower court to determine whether the policy was temporary, lasting no longer than the "discriminatory effects it [was] designed to eliminate."<sup>240</sup> This limited guidance grants the lower courts ample freedom in assessing the constitutionality of federal affirmative action programs, and will likely cause discrepancies among courts as to which types of programs pass strict scrutiny review.<sup>241</sup>

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properly used race as a factor in admissions decisions. *Hopwood v. Texas*, 1996 WL 120235, at \*26 (5th Cir. March 18, 1996). The school justified its use of race on three grounds, including the achievement of a diverse student body. *Id.* Using strict scrutiny analysis, the court found that attaining diversity was not a compelling interest. *Id.* at \*13. The court stated that, "the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection." *Id.* at \*11.

The Supreme Court denied certiorari. *Texas v. Hopwood*, 116 S. Ct. 2583 (1996). Justice Ginsburg, however, filed an opinion joined by Justice Souter, explaining that because the program at issue had been discontinued, the Court "must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition." *Id.* (opinion of Ginsburg, J.). Thus, the question of whether diversity may be a compelling government interest remains to be determined by the Supreme Court. *See id.* (refusing to evaluate the rationale of the court of appeals). In the meantime, the Supreme Court's denial of certiorari "casts doubt on all affirmative action programs in Texas, Louisiana, and Mississippi—the three states covered by the [Fifth Circuit]." Joan Biskupic, *Justices Decline to Hear Campus Diversity Case*, WASH. POST, July 2, 1996, at A1, A9.

To determine whether a program is narrowly tailored, courts must review certain factors developed in various cases: (1) whether the government considered race-neutral alternatives before enacting the program; (2) the program's scope; (3) whether race alone may determine eligibility for a program, or is merely one factor in eligibility requirements; (4) statistical comparisons between the number of qualified minorities in a particular industry and participation goals of the program; (5) the duration of the program; (6) the burden imposed by the program on non-minorities. Memo, *supra* note 235, at 19. As noted previously, courts may more readily defer to Congress when applying the strict scrutiny test to federal affirmative action programs. *See supra*, notes 228-32 (discussing the federal-state distinction regarding the deference issue); Memo, *supra* note 235, at 30-34 (suggesting that the *Croson* standards may apply "somewhat more loosely" to federal programs).

239. *Adarand*, 115 S. Ct. at 2118. This is one factor in determining whether a program is narrowly tailored. *See supra* note 238 (listing the various factors).

240. *Adarand*, 115 S. Ct. at 2118 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)). This too is one factor courts should consider when analyzing a program's narrow tailoring.

241. Courts already have experienced difficulties applying strict scrutiny review to state and local programs following the *Croson* decision. *See* Nicole Duncan, Note, *Croson Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679, 684 (1995) (discussing the problems lower courts have had in determining whether the program at issue satisfies the strict scrutiny requirements of *Croson*). Because of the uncertainty, lower courts have avoided applying the two-part strict scrutiny test, choosing instead to determine the validity of an affirmative action program by comparing the program at issue with the program in *Croson*, or by resolving the issue using the doctrines of standing or mootness. *Id.* at 680-81.

Some have argued that because of the recent judicial articulation of a federal-state distinction concerning the level of deference owed to legislators,<sup>242</sup> courts, in their *application* of strict scrutiny to federal remedial affirmative action programs, should more readily defer to Congress.<sup>243</sup> In a recent Department of Justice memorandum concerning *Adarand*, an Assistant Attorney General suggested that courts, when analyzing the propriety of federal affirmative action programs under the strict scrutiny standard, may be entitled to grant Congress greater deference.<sup>244</sup> Doing so, however, would frustrate the purpose of strict scrutiny and instead create a fourth standard of review less stringent than strict scrutiny, but more strict than intermediate scrutiny.<sup>245</sup> The *Adarand* Court clearly

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Even when a court does apply strict scrutiny, there are discrepancies as to the amount of statistical and historical evidence needed to satisfy the test. *Id.* at 684-85. State and local government actors utilizing affirmative action programs after *Croson* must provide a sufficient factual record supporting their determination that discriminatory effects still exist, and provide evidence that they used a high level of specificity in creating the affirmative action remedy. *Id.* at 684 n.18 (citing Janice R. Franke, *Defining the Parameters of Permissible State and Local Affirmative Action Programs*, 24 GOLDEN GATE U. L. REV. 387, 388 (1994)). For example, in *O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992), two white owners of a construction company challenged a District of Columbia law requiring that 35% of all contracts go to minority-owned businesses. *Id.* at 421-22. While the lower court found that the statistical evidence provided by the city was sufficient to demonstrate past discrimination, the appellate court determined that the program lacked the specificity required by *Croson*. *Id.* at 427. On remand, the Government in the *Adarand* case must be prepared to provide adequate statistical evidence of the lingering effects of past discrimination in the Colorado construction industry, as well as prove that the financial incentives provided to minority contractors were narrowly drawn to remedy the prior discriminatory effects.

242. See *supra* notes 228-32 (discussing the federal-state dichotomy regarding the amount of deference owed to governmental affirmative action programs).

243. Memo, *supra* note 235, at 2; see also Fried, *supra* note 143, at 114 (discussing the propriety of granting Congress greater deference in fact-finding).

While there may be some merit to the argument that Congress should be entitled to greater deference in its enactment of remedial affirmative action programs, based on its Fourteenth Amendment enforcement powers, this argument seems to fail in the non-remedial context. See Memo, *supra* note 235, at 33 (noting that because Congress's enforcement powers are not implicated, the dissenting Justices in *Metro Broadcasting* could not sanction the grant of greater deference to federal minority preference programs aimed at promoting broadcast diversity).

244. Memo, *supra* note 235, at 2, 30. For example, the author stated that:

It is unclear, however, what differences will emerge in the application of strict scrutiny to affirmative action by the national government; in particular, the [*Adarand*] Court expressly left open the question of what deference the judiciary should give to determinations by Congress that affirmative action is necessary to remedy discrimination against racial and ethnic minority groups.

*Id.* at 2. Assistant Attorney General Walter Dellinger further suggested that the *Adarand* Court "hinted" that *Croson*'s standards may apply less stringently to review of the federal government's affirmative action programs. *Id.* at 30.

245. Strict scrutiny review essentially allows courts to take an independent look at legislation without deferring to the judgments of lawmakers. See *supra* note 15 (discussing the

mandated strict scrutiny review of all affirmative action programs without discussing the issue of deference.<sup>246</sup> Thus, the plausibility of courts deferring more readily to Congress's enactment of affirmative action programs ended with *Adarand*'s strict scrutiny mandate.

### C. A Look Ahead

The *Adarand* decision already has had a profound impact on affirmative action programs across the United States.<sup>247</sup> Following the decision, President Clinton ordered a review of all federal affirmative action programs, culminating in an outline of standards that federal programs must meet.<sup>248</sup> The Justice Department, after its own review, eliminated a Defense Department minority preference rule used in contracting, citing the program's failure to satisfy the strict scrutiny standard.<sup>249</sup> Addition-

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traditional strict scrutiny analysis). If courts defer, the standard of review is no longer "strict." *Id.*

246. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995) (explaining that "classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests").

247. See, e.g., Virginia Ellis, *Wilson Defies U.S., Cuts Hiring Goals for Road Contracts*, L.A. TIMES, Dec. 23, 1995, at A1 (describing California Governor Pete Wilson's decision to reduce a state-wide minority construction hiring goal from 20 to 10 percent); Fern Shen, *Contractors Sue WSSC Over Minority Program*, WASH. POST, Nov. 30, 1995, at C6 (examining the decision of various contractors to challenge the constitutionality of the Washington Suburban Sanitation Commission's minority set-aside program); Amy Wallace, *UC Regents Set Preferences Ban for Spring 1998*, L.A. TIMES, Feb. 16, 1996, at A1 (discussing the decision of University of California Board of Regents to eliminate racial and gender preferences in admissions decisions beginning in 1998).

Popular consensus also forecasts that *Adarand* will have a significant impact on affirmative action programs. See Cassandra Burrell, *Federal task force examining affirmative action programs*, S.F. EXAMINER, Sept. 25, 1995, at A9 (quoting Representative Charles Canady's (R-FL) prediction that affirmative action programs will be invalidated and race will "come to play a smaller role in the federal legal landscape").

Even though *Adarand* may not directly affect specific programs, the decision makes justification of all affirmative action programs more difficult. See, e.g., Paul M. Barrett, *Los Angeles Racial Preferences Are Voided*, WALL ST. J., Aug. 1, 1995, at B9 (explaining the recent invalidation of the Los Angeles Transit Authority's minority set-aside program on the grounds that it failed the "narrowly tailored" prong of the strict scrutiny test).

Indeed, the affirmative action controversy has come to the forefront in recent months. See, e.g., Cathleen Decker, *Backers Rally for Affirmative Action*, L.A. TIMES, Feb. 23, 1996, at B9 (discussing the "Freedom Summer 1996" campaign aimed at opposing California's support for an initiative ending affirmative action); Dan Morain, *Petitions Turned in for Affirmative Action Ban*, L.A. TIMES, Feb. 22, 1996, at A1 (describing the collection in California of over one million signatures to place an anti-bigotry "California civil rights initiative" provision on the November 1996 election ballot).

248. Michael K. Frisby & Viveca Novak, *President to Outline Broad Standards to Keep Affirmative Action Programs*, WALL ST. J., July 19, 1995, at B8.

249. Ann Devroy, *Rule Aiding Minority Firms to End*, WASH. POST, Oct. 22, 1995, at A1, A8.

ally, the University of California Board of Regents decided to eliminate race and gender as criteria in its hiring, admissions, and contracting programs.<sup>250</sup>

Because of the uncertainty challengers face in predicting the outcome of the various courts' application of strict scrutiny, the future likely holds a marked increase in litigation threatening the legitimacy of the government's use of racial preferences in affirmative action programs.<sup>251</sup> Thus, the continued existence of governmental affirmative action programs remains largely uncertain.<sup>252</sup>

#### IV. CONCLUSION

The controversy surrounding affirmative action has not subsided since its inception. The Supreme Court has struggled consistently to determine the constitutionality of programs based on a fundamentally despised concept: classifying according to race. The *Adarand* decision, requiring courts to apply strict scrutiny to all governmental racial classifications,

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250. Craig Donegan, *Affirmative Action-A diversity of views are found on university campuses*, SAN ANTONIO EXPRESS-NEWS, Sept. 19, 1995, at B6. While California has taken what some would consider a radical step, other states are not far behind. Colorado's Attorney General, Gale Norton, recently recommended the elimination of Colorado's affirmative action programs. John Sanko, *Norton: Dump Affirmative Action*, ROCKY MOUNTAIN NEWS, Oct. 26, 1995, at 8A. She cited the *Adarand* case as requiring a showing of intentional discrimination to justify the state's affirmative action measures, which she said "would be hard to claim." *Id.* Norton instead suggested race-neutral remedies to achieve racial equality. *Id.*

251. The Court's decision already has sparked litigation. *See, e.g.*, Devroy, *supra* note 249, at A8 (discussing a pending federal court case in New Mexico challenging the "rule of two," which the Defense Department recently eliminated); Wade Lambert, *Chinese-American Students Sue to Kill Affirmative-Action Plan*, WALL ST. J., July 25, 1995, at B16 (describing a challenge by a group of minorities to the San Francisco School District's 12-year old desegregation plan); Joseph Mallia & Andrea Estes, *Latin School sued over race*, BOSTON HERALD, Aug. 15, 1995, at 1 (describing a father's suit against the Boston Latin School's use of racial quotas); Shen, *supra* note 247, at C6 (reviewing the lawsuit filed by Maryland contractors to eliminate minority preferences by the Washington Suburban Sanitation Commission). While there is disagreement as to which programs might survive strict scrutiny review, there is little doubt that *Adarand* will provoke a significant number of lawsuits concerning affirmative action. *See* Kenneth Jost, *After Adarand*, 81 A.B.A. J. 70, 71 (Sept. 1995) (commenting that *Adarand* "means gearing up for massive protracted litigation").

252. There are mixed opinions as to whether affirmative action programs will meet strict scrutiny requirements. Jost, *supra* note 251, at 70. Some believe that few programs will survive, while others contend that survival of specific programs will depend on the facts of the case, as well as on the presiding judges. *Id.* Because the *Adarand* decision did not address certain additional controversial issues surrounding affirmative action, litigation of these issues can also be expected. *See supra* notes 238-46 (discussing the uncertainty regarding the amount of deference owed to Congress, and the proffer of diversity as a compelling interest).

logically adds uniformity to the judicial analysis of affirmative action programs. The affirmative action struggle, however, does not end here. Courts must determine the proper application of strict scrutiny to federal and state programs. While uncertainty remains, the strict scrutiny standard of review will ensure that governmental affirmative action programs do not violate equal protection rights.

*Mary J. Reyburn*